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**The Treatment of Rape Victims within the Criminal Justice System: A comparative perspective**

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**The Treatment of Rape Victims Within the  
Criminal Justice System: A Comparative  
Perspective**

Thesis submitted for the Degree of  
Master of Philosophy

by

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## *Introduction*

Rape victims undergo a considerable ordeal when they embark upon the criminal justice process - not only does the system fail almost completely to vindicate them but it actually further abuses them also.<sup>1</sup> Very significantly, this proposition has recently been ratified by the government. In 1998, a Home Office report detailing a number of concerns about the treatment of this victim-group was published.<sup>2</sup> Following from this report, the Youth Justice and Criminal Evidence Act 1999 was enacted, introducing several measures aimed at improving their experience specifically at court.<sup>3</sup> This thesis aims to explore the treatment of this victim-group in order to determine how their experience throughout the judicial process might be improved to best effect. It is acknowledged that this is a subject which has been written about *ad nauseum*.<sup>4</sup> However, it is suggested that the utility of most rape literature is limited for, whilst it describes *how* rape victims are treated, its approach is too narrow to provide a full explanation of *why* they are so treated and, consequently, to present an effective challenge to this treatment.<sup>5</sup> This thesis will provide a broader framework for understanding why rape victims are treated as they are and, as such, it will be much better placed to address the issue of reform.

The tendency of most rape commentators is to examine the treatment of rape victims in isolation, eschewing any meaningful comparison with the experience of victims as

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<sup>1</sup> This will be shown throughout the course of this thesis.

<sup>2</sup> Home Office (1998).

<sup>3</sup> These measures are discussed in Chapter Five below.

<sup>4</sup> See, for example, LeGrand (1973); Weis and Borges (1973); Bohmer (1974); Bohmer and Blumberg (1975); Brownmiller (1976); Berger (1977); Clark and Lewis (1977); Holmstrom and Burgess (1978); Mitra (1979); Feldman-Summers and Palmer (1980); Newby (1980); Edwards (1981, 1996); McNamara (1981); Adler (1982, 1985, 1987); Temkin (1982, 1984, 1986, 1987, 1993, 1998); Chambers and Millar (1983, 1986, 1987); MacKinnon (1983, 1989); Patullo (1983); Williams (1984); Caringella-MacDonald (1985); Kelly and Radford (1987); Lees (1989, 1996, 1997); Rhode (1989); Los (1990); Russell (1990); Smart (1990); Brown, Burman and Jamieson (1992, (1993); Estrich (1992); Allison and Wrightsman (1993); Soothill and Soothill (1993); McColgan (1996).

<sup>5</sup> This type of literature did serve a very valuable purpose in earlier times. The highly descriptive analyses of the abuses suffered by rape victims which began to surface in the 1970's were instrumental in bringing the plight of this victim-group to the attention of the masses, something which clearly needed to be done. Of singular influence in this regard was Clark and Lewis' 1977 study *Rape: The Price of Coercive Sexuality*. Moreover, the spate of rape law reforms which occurred world-wide in the 1970's is to be attributed directly to such work - once exposed by this literature, the fact of the maltreatment of rape victims could not then be left unattended.



a whole.<sup>6</sup> This leads to the blanket assumption that the difficulties incumbent upon rape victims are singular to them and, following from this, that they derive from a specific prejudice against this victim-group. This thesis, on the other hand, adopts a comparative methodology, placing the treatment of rape victims alongside that accorded victims as a whole. This approach will reveal that, whilst there is a clear area of difference between how rape and non-rape victims are treated, there are also significant similarities. Consequently, it is clearly erroneous to explain the shoddy treatment of rape victims simply in terms of the specific social prejudices underlying rape cases and this thesis will demonstrate that, in fact, the structural and functional features of our criminal justice system are also to blame. Because most rape researchers have not employed a comparative methodology, they have underestimated - and in some cases even ignored - the role of these systemic factors.<sup>7</sup> In turn, their approach to the issue of reform is too restrictive, considering only how the rape trial process might be improved rather than addressing the shortcomings of the criminal trial process in general. The present study is intended to meet the shortfall left by these commentators, addressing both the attitudinal and the structural factors shaping the treatment of rape victims.

As to the proposed form and content of this thesis, Chapter One begins by examining three aspects of the rape trial which have attracted considerable criticism in traditional rape literature. These are the brutality of the cross-examination process and the joint inadequacies of both prosecuting counsel and judiciary. Further, as a preliminary to establishing the reasons behind these objectionable features, Chapter One examines also the experience of non-rape victims in these three areas. It will be shown that, contrary to the image presented in most rape literature, these features are common to all trials, regardless of case-type. This finding is then critical to the evaluation undertaken in Chapter Two wherein it is intended to establish the factors underlying the treatment outlined in Chapter One. Because rape and non-rape victims endure an almost identical experience in this regard, Chapter Two begins from the premise that there is a common cause behind this treatment. This second chapter goes on to show

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<sup>6</sup> In recent years, a few commentators have elected to take a more balanced approach to the subject, placing the treatment of rape victims within the context of the experience of victims as a whole. See McBarnet (1983); Brereton (1997); Ellison (1998), in this regard. It is suggested, however, that such work might also be guilty of verging on the simplistic, particularly Brereton and McBarnet who conclude that the plight of rape victims is substantially no different to that of victims as a whole.

that this common cause lies among the structural and functional features of our criminal justice system.

Chapter Three then outlines those aspects of the rape trial which have attracted the most vehement criticism, namely the use of sexual history evidence, the corroboration warning requirement and the operation of section 1(f)(ii) of the Criminal Evidence Act 1898.<sup>8</sup> Like Chapter One, Chapter Three is concerned to establish how these features of the rape trial accord with the conduct of trials generally. Therefore, a comparative methodology is again adopted whereby the treatment of rape victims in these three areas is measured against the treatment of victims as a whole. As before, this comparative approach is critical to establishing just why rape victims are treated as they are. In contrast with the commonality revealed in Chapter One, Chapter Three will demonstrate that these three aspects of the rape trial represent a significant and unjustifiable departure from the conduct of trials generally. Accordingly, Chapter Four explores the possibility that this discriminatory treatment derives from prejudicial attitudes towards rape victims.

Finally, Chapter Five is concerned to establish exactly how the difficulties outlined throughout the course of this thesis might best be resolved. The central proposition of this thesis is that, if real improvement is to be achieved, a root and branch approach to reform must be taken, any suggestions made going directly to the source of the problems. Hence the emphasis on determining accurately why rape victims are treated as they are. Thus, Chapter Five discusses structural, functional and cultural reform. Not only will this approach improve the rape victim's experience at court but, because it addresses the flaws endemic to the criminal justice system, it will ensure significant improvement in their treatment *throughout* the criminal justice process. This is critical because, although the difficulties highlighted throughout this thesis pertain mainly to the trial process, it is the case that rape victims encounter objectionable treatment at all stages of the judicial process.

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<sup>7</sup> Brereton (1997), p 259.

<sup>8</sup> It is acknowledged that the corroboration warning requirement was abolished by the Criminal Justice and Public Order Act 1994. However, as will be shown in Chapter Three, section 3.3, the matter remains highly pertinent to the theme of this thesis.



On a general note, because most of the important caselaw and academic research pertains to Great Britain, this thesis refers throughout to the legislative provisions of that jurisdiction. However, unless otherwise indicated, the Northern Ireland legislation may be taken to be identical. Also, whilst section 142 of the Criminal Justice and Public Order Act 1994 extended the legal definition of rape to encompass anal as well as vaginal penetration, thus rendering rape a gender-neutral crime, this thesis is framed throughout in terms of the female complainant's experience only.<sup>9</sup> This is because, despite the growing incidence/awareness of male rape, rape is a crime which continues to affect predominantly women.<sup>10</sup> In fact, in Northern Ireland, rape continues to be a gender-specific crime, article 2 of the Sexual Offences (NI) Order 1978 which provides the legal definition of rape remaining unaffected by section 142.

Finally, a number of changes have recently been wrought within the law of rape by way of the Youth Justice and Criminal Evidence Act 1999. Consequently, it might be questioned whether it is really necessary to reconsider the issue of reform. However, it is suggested that, in addition to enhancing the topicality of the present study, the fact of these latest developments actually increases its utility also. This is because it should not be assumed that the 1999 Act will bring about the necessary improvements. That is, it is not clear that the Act addresses all of the relevant problems or that it deals adequately with those to which it does defer. Therefore, an integral function of this thesis will be to evaluate these long-awaited changes in terms of whether or not they meet the demands of the situation.<sup>11</sup> The information collated throughout this thesis as to the major difficulties which must be addressed as well as their reason for being will ensure that this evaluation is properly conducted. Therefore, in addition to enabling the making of appropriate and effective reform proposals, the research undertaken in this thesis lends itself also to the necessary task of assessing the worth of the recent reforms.

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<sup>9</sup> Whilst the crime is gender-neutral in terms of the victim, it remains gender-specific with regard to the perpetrator so that only a male can legally be guilty of rape.

<sup>10</sup> Home Office (2000), p 49.

For an insight into the incidence of male rape specifically see, for example, Gillespie (1996).

<sup>11</sup> This will be done in Chapter Five.

## *Chapter One*

### *Equal Injustice for All*

#### *1.1 Introduction*

Rape trials can be seen as a spectacle of torture, a feudal remnant, by which rather than protecting women, the trial can be seen as a public mechanism for the control of female sexuality.<sup>12</sup>

The principle aim of this thesis is to determine how the experience of rape victims within the criminal justice system can be improved to best effect. However, before the issue of reform can be specifically addressed, it is necessary to provide answers to the following preliminary questions. First of all, what are the specific aspects of the treatment of this victim-group which need to be changed? Secondly, why does this unsatisfactory treatment occur? The analysis undertaken in this present chapter will go some way towards answering these questions. Via a review of the literature on the topic, this chapter will provide an outline of three aspects of the rape victim's experience at court that give rise to vehement criticism.<sup>13</sup> The first of these is an aspect which is central to any discussion of this victim-group's treatment at court - the cross-examination process. The second and third issues concern the way in which both prosecuting counsel and judiciary discharge their role in the course of the trial. In addition, because of its significance to the question of why rape victims are treated as they are, this chapter aims to establish whether or not rape complainants are treated differently to victims as a whole. To this end, this chapter examines also the experience of non-rape victims in the aforementioned areas.

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<sup>12</sup> Lees (1997), p 88.

<sup>13</sup> A further three crucial aspects have been reserved for discussion in Chapter Three below.



## 1.2 Cross-Examination

### 1.2.1 Rape Trials

The purpose of the cross-examination of the complainant appears to be to uncover the real culprit of the trial, the whore, the insatiable female harridan, vengeful and often in disguise; behind the young beautiful girl lurks the archetypal Eve who ensnares male rationality and drags men down.<sup>14</sup>

Referring to the cross-examination exercise, Temkin explains that while much criticism has centred on the use of sexual history evidence to blacken the character of rape complainants, “other strategies commonly employed against them are equally oppressive and invidious”.<sup>15</sup> Leaving the issue of sexual history evidence to be discussed in Chapter Three below, this present section examines the other objectionable strategies commonly used by defence counsel in the cross-examination of rape complainants.

#### 1.2.1.1 Discrediting the Victim

Various court procedures weight the trial in favour of the defendant, making it very difficult for jurors to convict, even when the evidence is convincing. This is mainly a result of all the extraneous factors that can be introduced and often involve attacks on the woman’s reputation, as not merely her sexual history but all kinds of irrelevant factors relating to her past are discussed. *She is subjected to a ruthless character assassination, a humiliating trial, a form of judicial rape.*<sup>16</sup>

Much of the focus in rape literature is directed at the emphasis which is placed during cross-examination on discrediting the complainant and the ways in which it is sought to do this.<sup>17</sup> Temkin’s recent study on the problems encountered in prosecuting rape and the strategies involved when defending against rape charges, suggests that this literary attention is warranted.<sup>18</sup> In this study, Temkin interviewed a small sample of highly experienced barristers who together had appeared in hundreds of rape trials as prosecuting or defence counsel. Asked about the way they defended rape cases,

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<sup>14</sup> Lees (1997), p 88.

<sup>15</sup> Temkin (1987), p 6.

<sup>16</sup> Lees (1997), p 56. (Emphasis added.)

<sup>17</sup> See, for example, Bohmer and Blumberg (1975); Holmstrom and Burgess (1978); Newby (1980); Adler (1987); Chambers and Millar (1987); Temkin (1987); Lagen (1988); Lees (1996; 1997); Temkin (1998).

<sup>18</sup> Temkin (1998).



Temkin reports that the barristers made it clear that their “*central strategy*” was to discredit the complainant.<sup>19</sup>

As to the ways in which this done, Holmstrom and Burgess found that defence counsel cast aspersions on all aspects of the complainant’s personal circumstances and character.<sup>20</sup> Indeed, they report, almost anything other than completely proper and respectable behaviour can be used - criminal record, mental problems, psychiatric history, alcohol use, drug use, absence from school, religious views, even vague innuendoes.<sup>21</sup> Similarly, Lees reports that questioning as to credibility routinely centres on the complainant’s lifestyle including her living arrangements; whether she was a single mother; whether the man she was living with was the father of her children; the colour of her present and past boyfriends (where the woman was white); who looked after her children while she was at work; whether she was in the habit of going to night-clubs on her own late at night; whether she smoked cannabis and drank alcohol (when there was no evidence of this); whether she had had an abortion, etc.<sup>22</sup>

Chambers and Millar, too, found that attacks on the complainant’s character are common and wide-ranging.<sup>23</sup> They reveal that a variety of tactics are used to infer that the woman is of low moral character and, again, they identify the purpose as being to challenge the woman’s credibility in relation to the issue of consent and the veracity of her evidence in general.<sup>24</sup> Like Lees, Chambers and Millar found that questioning centres on personal living arrangements and general social activities.<sup>25</sup> They point out that such evidence is clearly extraneous to the incident itself and provides the court with highly selective items of information about the complainant.<sup>26</sup> This information, they report, has very strong moral overtones.<sup>27</sup> For example, in more than half the cases where consent was at issue, it was brought out in questioning that the complainant was divorced, or was an unmarried mother, or that she was in the

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<sup>19</sup> Temkin (1998), p 17. (Emphasis added.)

<sup>20</sup> Holmstrom and Burgess (1978), p 184.

<sup>21</sup> *Ibid.*

<sup>22</sup> Lees (1996), pp 134-137.

<sup>23</sup> Chambers and Millar (1986), p 107.

<sup>24</sup> *Ibid.* at p 106.

<sup>25</sup> *Ibid.* at p 111.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

habit of either drinking with strangers or drinking to excess.<sup>28</sup> Discovery of the existence of a criminal conviction was also part of this general attack on character.<sup>29</sup> In one case, the complainant was asked about the paternity of her children and in particular about her illegitimate child.<sup>30</sup> In another case, detailed questioning by the defence revealed that the complainant was separated from her husband, did not live with nor look after her children, had been living rough for some time and when the incident occurred was living in a hostel for the homeless.<sup>31</sup>

Newby similarly found it to be a common defence tactic to impugn the character of the complainant.<sup>32</sup> This, he reports, may include but goes far beyond references to her sexual past so that attention may be drawn to behaviour such as hitch-hiking, excessive drinking or smoking, the use of bad language, and type of clothing.<sup>33</sup> Other commentators, too, have noted the significance attached by defence counsel to the complainant's clothing and his manipulation of this to depict her as immoral and hence untruthful. Lees reports how in one case, "great emphasis" was placed on the complainant's clothing, most particularly her underwear, and concluded that the implicit objective seemed to be to undermine her credibility.<sup>34</sup> Corroborating this, the barristers in Temkin's study admitted that a favourite tactic for undermining the credibility of the complainant is to malign her clothing, suggesting that she brought the rape on herself by the way she was dressed.<sup>35</sup> Clothing worn in court as well as at the time of the rape might also be scrutinised.<sup>36</sup>

Paradoxically, even the complainant's use of sexually explicit language in the witness-box is used to depict her as lacking in respectability despite the fact that she is required to be graphic and finds doing so alien and distressing. This was observed by Lees who says that the very use of such language, referring to private sexual parts of the anatomy, is sufficient to render a woman unrespectable because many women never say such words even in the privacy of their homes, let alone to strangers in open

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<sup>28</sup> *Ibid.* at p 107.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* at p 108.

<sup>31</sup> *Ibid.* at p 111.

<sup>32</sup> Newby (1980).

<sup>33</sup> *Ibid.* at p 120.

<sup>34</sup> Lees (1996), p 139.

<sup>35</sup> Temkin (1998), p 17.

<sup>36</sup> *Ibid.*



court.<sup>37</sup> Chambers and Millar similarly found that defence counsel tried to equate knowledge of sexual terminology with sexual experience or promiscuity.<sup>38</sup> Smart also noted that the act of describing in detail what the man did and how she responded is enough subtly to render the complainant ‘unrespectable’.<sup>39</sup>

Ultimately, Lees observed that really any indication of autonomous behaviour on the part of the complainant is construed so as to depict her as ‘unrespectable’ and thereby untrustworthy.<sup>40</sup> She concluded that “the defence’s strategy is clearly to use *every means* to cast doubt upon the woman’s credibility and ‘respectability’”.<sup>41</sup> The barristers interviewed by Temkin all but admitted this, making it clear that their approach to the task of defending rape cases was robust to the point of ruthlessness.<sup>42</sup> One female counsel put it in the following terms: “when I’m defending it’s no holds barred”.<sup>43</sup> Whilst all the barristers in Temkin’s study denied that they personally went in for harassment of the complainant (most conceded that this does go on in rape trials), they did admit that they employed every tactic short of this.<sup>44</sup>

Of course, the most obvious way in which the complainant’s credibility may be attacked is by accusing her of telling lies. Chambers and Millar report that complainants were frequently accused outright of lying, being commonly asked “are you telling the truth?” and “is that the whole truth?”.<sup>45</sup> In addition to outright accusations of untruthfulness, they report that it was also common practice for defence counsel to “insinuate” untruthfulness during cross-examination, asking, for example, “are you sure about that?”.<sup>46</sup> Further, in order to bolster these accusations of untruthfulness, Chambers and Millar found that defence counsel allege motives for it, such as pregnancy, financial gain or spite.<sup>47</sup> They cite one case where the complainant was accused of making a false complaint of sexual assault in order to

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<sup>37</sup> Lees (1997), p 79.

<sup>38</sup> Chambers and Millar (1986), p 109.

<sup>39</sup> Smart (1990), p 205.

<sup>40</sup> Lees (1997), p 66.

<sup>41</sup> Lees (1989a), p 13. (Emphasis added.)

<sup>42</sup> Temkin (1998), p 17.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Chambers and Millar (1986), p 114.

<sup>46</sup> *Ibid.* at p 115.

<sup>47</sup> *Ibid.* at p 116.

claim money from the Criminal Injuries Compensation Board.<sup>48</sup> Lees also found that it was an effective defence strategy to be able to suggest to the court that the complainant had a motive for making up the accusation, for example, was she acting in revenge because she had been jilted or because she did not dare to admit to her boyfriend that she had been unfaithful.<sup>49</sup> Invariably, Lees explains, the motives imputed to complainants are often specious.<sup>50</sup>

The efforts to depict them as immoral liars must mean that rape complainants undergo a very arduous cross-examination ordeal. Nevertheless, this of itself cannot be proper grounds for criticism since fairness to the accused calls for the unreliability of the accuser to be disclosed. However, what is wholly objectionable is that, very often, complainants are subjected to invasive and defamatory questioning when no probative connection exists between this questioning and the issue of credibility - it is simply not clear what being a single parent, having had an abortion, drinking alcohol, swearing, or wearing short skirts has got to do with standing for credit. In fact, commentators argue that such matters are rarely *properly* relevant to the issue of credibility but serve, instead, to reduce the complainant's standing by more insidious means. Rhode, for example, explains that the complainant's character is maligned in order simply to prejudice the jury against her because, "as jury studies reflec[t], condemnation of the victim often mean[s] acquittal for the assailant, even under circumstances clearly demonstrating rape".<sup>51</sup> That this is the unedifying objective behind the routine character assassinations carried out in rape trials has been confirmed by actual defence practitioners. Counsel interviewed by Brown *et al* , for example, admitted that the purpose of raking the complainant's "undesirable" lifestyle and characteristics before the court is to create a "smokescreen of immorality" around her.<sup>52</sup> Similarly, Temkin learned that counsel regarded the facts to be of relatively minor significance, the main task being, as one barrister put it, "to undermine the woman's personality".<sup>53</sup>

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<sup>48</sup> *Ibid.*

<sup>49</sup> Lees (1989a), p 12.

<sup>50</sup> Lees (1997), p 66.

<sup>51</sup> Rhode (1989), p 249.

<sup>52</sup> Brown, Burman and Jamieson (1992).



### 1.2.1.2 *Blaming the Victim*

[R]esponsibility for rape and male sexual violence gets subtly shifted on to women. It is they who should take evasive action, ensure that they are not “asking for it” by being out late at night, or hitch-hiking or drinking in public; or that they are not “leading men on” by wearing a short skirt, or flirting, or going back to a man’s house, or in any way behaving autonomously. These popular sexist attitudes find expression in court.<sup>54</sup>

As outlined in the previous section, defence counsel frequently seek to paint rape complainants as lacking in respectability. This, it was explained, is done in order to undermine their credibility as witnesses.<sup>55</sup> However, commentators complain that it is also used to serve another highly popular cross-examination tactic, that of putting the blame for the rape incident onto the complainant. Bohmer and Blumberg, for example, report that the atmosphere in “most” rape trials appears to “place the woman in the position of having to prove herself innocent of *soliciting* the assault in some way”.<sup>56</sup>

Commentators report that blaming the rape victim takes the form of presenting her as having ‘asked for’ the assault or as having ‘deserved’ what she got. Lees, for example, observed that defence counsel would seek to show that the complainant had “provoked” the incident - by the amount she had drunk; dancing provocatively; going to the defendant’s flat; asking the defendant back; taking drugs; soliciting, etc.<sup>57</sup> As with the discrediting exercise, the type of clothing worn by the complainant features heavily in efforts to place the blame on her. We recall how Temkin, for example, observed that one popular defence tactic involved maligning the complainant’s clothing so as to suggest to the jury that she had brought the assault on herself because of the way she dressed.<sup>58</sup> Lees also observed that complainants are subjected to unnecessary and protracted questioning about their clothing, especially their underwear, and concludes that young women who dress quite normally in today’s

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<sup>53</sup> Temkin (1998), p 17.

<sup>54</sup> Lees (1989b), p 14.

<sup>55</sup> Where this exercise involves attacking the complainant’s sexual respectability, this is done with the added objective of showing that she consented to the intercourse in question (see Chapter Three below).

<sup>56</sup> Bohmer and Blumberg (1975), p 398. (Emphasis added.)

<sup>57</sup> Lees (1989a), p 12.

<sup>58</sup> Temkin (1998), p 17.

fashions are “put on trial because of it”.<sup>59</sup> The purpose of such “distortion”, she says, is “to give jurors the impression that the woman is provocative and therefore to blame for the incident”.<sup>60</sup>

Chambers and Millar identified another way in which defence counsel seek to blame the rape victim for the assault and this is by implying that she acted *foolishly*.<sup>61</sup> Thus, a complainant may find herself castigated for being out alone at night, being in the company of strangers, or otherwise “taking risks”.<sup>62</sup> Lees similarly found that defence counsel try to show that the complainant had “provoked” the incident by, for example, being out late at night.<sup>63</sup> Temkin, too, learned from actual counsel that a favourite tactic is to question the complainant about her conduct at the time of the alleged rape in order to imply that she had behaved foolishly and so had only herself to blame.<sup>64</sup> She reports that the barristers had found this tactic to be particularly effective with a jury containing middle-aged or elderly women.<sup>65</sup> Estrich also observed this victim-blaming exercise and calls it the “assumption of risk” approach which invites outsiders to view women who put themselves in compromising positions as unentitled to complain when they have been compromised.<sup>66</sup>

The rationale behind depicting the complainant as provocative or foolish is that blame for the rape is shifted onto her and, this done, the jury is less inclined to blame the defendant and, consequently, less inclined to convict him. This victim-blaming process works in one way by prejudicing the jury against the particular complainant - perceiving her as immoral or as a risk-taker, jurors feel little sympathy for her, certainly not enough to justify sending a man to prison. It also works by playing on the pre-conceived notions which jurors hold about rape victims generally. Central to these misconceptions is the much-mentioned ‘real’ rape myth.<sup>67</sup> According to this myth, rape occurs only in the following stereotypical circumstances: the victim is

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<sup>59</sup> Lees (1996), p 138.

<sup>60</sup> *Ibid.*

<sup>61</sup> Chambers and Millar (1986), p 116.

<sup>62</sup> *Ibid.*

<sup>63</sup> Lees (1989a), p 12.

<sup>64</sup> Temkin (1998), p 17.

<sup>65</sup> *Ibid.*

<sup>66</sup> Estrich (1992), p 10.

<sup>67</sup> See, for example, Kelly and Radford (1987); Williams (1984); McColgan (1996). This myth is discussed in detail in Chapter Four, section 4.4 below.



sexually inexperienced and has a 'respectable' lifestyle, her assailant is a stranger whose company she had not willingly found herself in, she fought back, was physically hurt, and, afterwards, promptly reported the offence.<sup>68</sup> Women whose rape conforms to this stereotype are seen as 'genuine' victims. Therefore, they are much more likely to be believed and much less likely to be blamed for the incident. Because of this, Weis and Borges explain, defence counsel routinely contrast the character and behaviour of individual rape complainants with that of the 'ideal' rape victim.<sup>69</sup> That is, the complainant will be portrayed as being 'unrespectable' or otherwise 'asking for' the assault, or as being 'foolish' and bringing it upon herself. A 'real' rape victim, it will be explained, would not have taken the risks that the complainant took, nor would she drink alcohol, be divorced, or have an illegitimate child, etc. In this way, the jury are discouraged from believing the complainant or, believing her, encouraged to blame her.

As with discrediting the complainant, it seems that the blaming exercise pays little regard to the truth. Lees, for example, observed that "allegation rather than evidence is often enough".<sup>70</sup> However, even if a complainant did behave foolishly or provocatively, the chain of reasoning which enables the defendant to thereby escape liability is surely spurious. This is because by seeking to blame the complainant, the defence is conceding that a blameworthy incident - a rape - did indeed occur. It is wrong, therefore, that the complainant's conduct should be manipulated in order to nullify the defendant's guilt.<sup>71</sup>

### *1.2.1.3 Harassing the Victim*

Another aspect of the cross-examination of rape complainants which draws major criticism is what is seen as the deliberate harassment of the victim by questioning her relentlessly on the details of the rape. Temkin states that this is a tactic which is frequently deployed in rape trials in many jurisdictions.<sup>72</sup> In Western Australia, for example, Newby reveals that it is a "distinct" tactic with complainants being required

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<sup>68</sup> Adler (1987), p 119.

<sup>69</sup> Weis and Borges (1973), pp 71-115.

<sup>70</sup> Lees (1989a), p 12.

<sup>71</sup> Unless this conduct impacted on the accused's belief as to whether or not the complainant was consenting, thus affecting a substantive element of the rape offence. However, this is a quite separate issue from that under discussion.

<sup>72</sup> Temkin (1987), p 6.

“to reiterate again and again the details of the rape incident”.<sup>73</sup> In Scotland, too, Chambers and Millar observed many instances of rape complainants being persistently questioned by defence counsel on obscure minutiae of the incident.<sup>74</sup> They recount how one woman was asked detailed questions about the accused’s watch and jewellery even though it was dark at the time of the incident.<sup>75</sup> In another case, a young girl who had been violently assaulted in the stairway of a derelict building was asked how many stairs she had been dragged along and in what way she was facing when she was being assaulted.<sup>76</sup> They report that some of the persistent questioning took the form of a very lengthy wearing down process which put the complainant under considerable strain and cite one cross-examination excerpt in full in order to illustrate its “relentlessness”.<sup>77</sup> In that case, questioning continued for some considerable time, terminating only when the complainant fainted.<sup>78</sup>

Estrich also refers to this type of questioning, noting its use particularly in acquaintance rape cases.<sup>79</sup> She points out that in these cases, it is not the victim’s identification of her assailant but her account of exactly what happened which is the likely focus of defence scrutiny.<sup>80</sup> Referring to the William Kennedy Smith rape trial, Estrich describes how, in discrediting Patricia Bowman’s testimony, defence attorneys exploited every single inconsistency in her statements, no matter how minor.<sup>81</sup> In another highly publicised American case, intense cross-examination of the complainant by three defence attorneys focused on each, sometimes minute, inconsistency in her testimony.<sup>82</sup> For example, part of the victim’s testimony was that the defendants (fellow university students) had gotten her so drunk that she was passing in and out of consciousness and that she had come round to find several young men sodomising her. However, rather than being persuaded by the overwhelming evidence of drunkenness - there were eye-witness accounts - the jury

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<sup>73</sup> Newby (1980), p 119.

<sup>74</sup> Chambers and Millar (1986), p 117.

Other writers who have made much of this cross-examination tactic include Bohmer and Blumberg (1975) and Holmstrom and Burgess (1978).

<sup>75</sup> Chambers and Millar (1986), p 117.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.* at pp 117-120.

<sup>78</sup> *Ibid.* at p 120.

<sup>79</sup> Estrich (1992), pp 27-32.

<sup>80</sup> *Ibid.* at p 28.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.* at p 29.



seemed more influenced by the complainant's inability to recount exactly the number of vodka drinks she had had. So intensely detailed was the cross-examination that the complainant is reported to have shouted, "I wasn't paying attention. I was being abused." In the end, the three defendants were acquitted. The jury foreman commented, "If you're going to accuse someone of a serious crime, you'd better be able to back it up."<sup>83</sup>

As to the rationale behind this practice of relentlessly questioning the complainant, particularly about trivial or humiliating details, there can be little doubt that it is done in order to heighten the trauma experienced by her in court and thereby to reduce her competence as a witness - the more distressed she becomes, the more likely it is that she will also become angry, confused, unsure, incoherent, etc. In addition, Newby asserts that rape complainants are harassed in this way in an attempt "to twist their interpretation of events so as to make them consistent with an assumption of consent".<sup>84</sup> Chambers and Millar identified also a variation on this theme. This occurs when defence counsel doggedly persist with a detailed line of questioning, despite the complainant's repeated denials.<sup>85</sup> The purpose of this, they explain, is to introduce to the jury the idea that there might indeed be some truth in the denied allegations.<sup>86</sup> In this way, it is possible to *force* an image of consensual sex upon the jury despite the complainant's strong denials.

Estrich says that another reason why rape complainants are badgered about minor details is that juries still hold this victim-group to "higher standards of consistency".<sup>87</sup> In fact, she suggests that rape complainants may face credibility tests whose burden is so high that no truthful victim could ever pass them.<sup>88</sup> Estrich explains that there are a number of reasons for this, including ambivalence about the crime of acquaintance rape, disapproval of the woman's behaviour, and the sort of racial animosity which has always played a role in rape cases.<sup>89</sup> Therefore, by focusing on even very minor inconsistencies in a complainant's testimony, defence counsel are able to take

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<sup>83</sup> *Ibid.*

<sup>84</sup> Newby (1980), p 119.

<sup>85</sup> Chambers and Millar (1986), p 120.

<sup>86</sup> *Ibid.*

<sup>87</sup> Estrich (1992), p 29.

<sup>88</sup> *Ibid.* at pp 29, 30.

<sup>89</sup> *Ibid.*

advantage of these and other prejudices which make jurors predisposed to mistrust this victim-group.

#### *1.2.1.4 Humiliating the Victim*

Commentators complain also that defence counsel make concerted efforts to humiliate rape complainants. Chambers and Millar, for example, observed that an important defence strategy is to “embarrass or shame” the complainant.<sup>90</sup> They reveal that this is done by asking questions “insensitively and making little allowance for the complainer’s feelings”.<sup>91</sup> Whilst this is usually achieved by questioning the complainant on her sexual history, other methods are also used. Chambers and Millar describe how the complainant in the following case, for example, was asked a number of “unnecessary, detailed personal questions”:

- DC: Are you wearing tights at the moment?  
C: Yes.  
DC: You are wearing pants at the moment?  
C: Yes.  
DC: Are your pants at the moment under or over your tights?  
C: They are under just now because of...  
DC: You were starting to tell us the reasons, weren't you?  
C: Yes, because I had my periods.  
DC: But when you are not in that position you normally wear the pants outside the tights?  
C: Usually, sometimes, yes ... not always, it depends.<sup>92</sup>

Lees similarly observed that defence counsel routinely seek to humiliate rape complainants. She noted that a particularly effective way in which this is done is by handing the complainant’s underwear around in court.<sup>93</sup> Indeed, in an interview on the Panorama programme *The Rape of Justice* (1993), Judge Perleman remarked that many rape complainants find this the most appalling part of the trial, even worse than describing the actual assault. The following excerpt illustrates the degrading nature of this exercise:

- DC: Do you recognise that garment?  
C: Yes.

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<sup>90</sup> Chambers and Millar (1986), p 116.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* at pp 116, 117.

<sup>93</sup> Lees (1997), p 61.



DC: Your knickers. Are they clean?

C: I don't know.

(The usher ostentatiously puts on rubber gloves and picks up the exhibit.)

DC: I think they are the ones you took off.

Judge: Would you like some plastic gloves? Or I don't suppose you mind handling your own knickers?<sup>94</sup>

Because the complainant's underwear is unlikely to bear any forensic value (the fact of intercourse is not usually in dispute in most rape trials and it is to this end that forensic evidence really bears any value), there really seems to be no legitimate purpose behind handing the complainant's garments round. Lees claims, therefore, that the practice is no more than a deliberate exercise in degradation of the woman.<sup>95</sup>

Commentators reveal that another popular method of humiliating rape complainants is by questioning them about their period. Lees, for example, noted that defence counsel frequently make reference to whether or not the complainant was menstruating at the time of the alleged rape.<sup>96</sup> She describes how the complainant referred to above underwent two further hours of "humiliating" cross-examination involving "demeaning" and "unnecessary" questions, such as, how had the defendant managed to remove her Tampax - had he difficulty with the string?<sup>97</sup> Lees reports that the complainant frequently broke down in tears and the defendant was acquitted.<sup>98</sup>

Referring specifically to the humiliation caused by questioning rape complainants on their sexual history, McEwan explains that some of the motive is to cause them "as much distress as possible, thereby undermining [their] performance in the witness-box".<sup>99</sup> This rationale can equally be applied to the other methods used to humiliate rape complainants.

### *Summary*

The previous discussion highlighted a number of aspects of the cross-examination of rape complainants which attract repeated criticism. A study conducted by Victim

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<sup>94</sup> Lees (1989a), p 13.

<sup>95</sup> *Ibid.*

<sup>96</sup> Lees (1996), p 143.

<sup>97</sup> Lees (1989a), p 13.

<sup>98</sup> *Ibid.*

Support into how these victims feel about their cross-examination experience confirms this representation of it as a very gruelling ordeal for respondents described it as “traumatic”, “patronising”, “humiliating”, making them feel “as if they were on trial”, a second victimisation, and “worse than the rape”.<sup>100</sup> It is accepted, therefore, that defence counsel subject rape victims to a considerable ordeal in the witness-box. However, it remains to be seen whether only rape victims suffer in this way. In order to determine this, the cross-examination experience of victims as a whole will now be examined.

### ***1.2.2 Other Trial Contexts***

Cross-examination was waged as if to unmask those with false pretensions to knowledge, and it worried away at any semblance of contradiction, inconsistency, deceit, and error. It played on the expressions, gestures, and demeanour that seemed to betray the cheat and the liar. Witnesses were people whose very moral status was in contention.<sup>101</sup>

The dominant perspective in most rape literature is that rape complainants are treated differently from complainants of non-sexual offences. With specific regard to cross-examination, Ellison tells us that it is assumed that the types of questions routinely put to rape complainants would be considered unacceptable in other trial contexts.<sup>102</sup> Adler, for example, makes the explicit claim that defence counsel in rape trials use strands of attack to undermine the woman’s evidence and to shake her story which would be considered totally unacceptable in the context of a serious non-sexual assault.<sup>103</sup> However, as explained, rape commentators tend to examine the treatment of rape victims without making any comparative reference to the experience of victims generally. It was suggested that because of this simplistic approach, the image of singular maltreatment presented in most rape literature may not be wholly accurate. Empirical research conducted into the cross-examination experience of victims as a whole supports this proposition. Highly illustrative in this regard is

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<sup>99</sup> McEwan (1992), p 104.

<sup>100</sup> Victim Support (1996).

<sup>101</sup> Rock (1993), p 86.

<sup>102</sup> Ellison (1998), p 607.

<sup>103</sup> Adler (1987), p 53.



Rock's study of trial proceedings at London's Wood Green Crown Court.<sup>104</sup> Rock reports that witnesses of all kinds "detested cross-examination so much that they reacted viscerally".<sup>105</sup> He quotes one victim in this regard:

I was ill. I collapsed in the witness-box... you could tell I was shaking, I was going to pass out, but they didn't offer me a chair or anything. I really wanted to sit down.

I could feel myself going, I was hanging on to the table.<sup>106</sup>

All in all, Rock found that witnesses felt bullied, traduced, embarrassed, hurt, and basically as if they were on trial themselves. He quotes one witness who complained, "I felt *I* was trying to prove my innocence in all this."<sup>107</sup> Not surprisingly, then, Rock found that witnesses tended to "detest the defence lawyers who had inflicted all that discomfort".<sup>108</sup>

In the following pages, the specific methods used in the cross-examination of non-rape victims will be examined. In so doing, the accuracy of the claim that rape victims undergo forms of questioning which would be considered unacceptable in other trial contexts is tested.

#### *1.2.2.1 Discrediting the Victim*

Almost as a matter of course, counsel would, as a judge put it, so 'blackguard' the witnesses that they were no longer believable. Under cross-examination, victims and prosecution witnesses could be asked about matters touching on their 'title to credit': their way of life, their associations, their past convictions, their disinterestedness, and their integrity. They could be vilified and shamed as they defended, in public and perhaps for the very first time, testimony about matters that were painful, embarrassing and once personal.<sup>109</sup>

From his trial observations, Rock noted that prosecution witnesses in all types of case are subject to vigorous attempts to discredit them.<sup>110</sup> He explains that because *victim*-witnesses are "the pivot of the prosecution case", they are in for a particularly hard

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<sup>104</sup> Rock (1993).

<sup>105</sup> *Ibid.* at p 176.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.* at p 34.

<sup>110</sup> *Ibid.* at p 29.

time.<sup>111</sup> Thus, they are almost automatically challenged by the defence about their veracity, disinterestedness, integrity, knowledgeability, way of life, reputation, and associations.<sup>112</sup>

In this discrediting exercise, Rock observed that the most common strategy is to accuse outright the prosecution and its witnesses of lying.<sup>113</sup> He explains that this takes the form of “slamming” whereby the witness is repeatedly and forcefully accused of falsehood.<sup>114</sup> Rock observed that this is usually done in the final stages of cross-examination and is so vigorous that “it can damage the witness beyond repair, or destroy him”.<sup>115</sup> Great distress is also engendered by the fact that this denigration - being “cast as tellers of untruths” - is conducted in full view of the public.<sup>116</sup> Rock further observed that, in order to enhance the effectiveness of accusations of untruthfulness, defence counsel endeavour to show that complainants have some motive for making a false report to the police. For example, in one case, the complainant was accused of being motivated by the possibility of obtaining criminal injuries compensation.<sup>117</sup> In his comparative study of rape and assault trials, Brereton similarly observed that complainants in non-sexual offence cases are accused of lying and of having particular motives for doing such.<sup>118</sup> Referring to the relationship between rape and non-rape trials in this regard, he concluded that questions aimed at imputing a motive for making a false report were asked of “virtually an identical proportion” of rape and assault complainants.<sup>119</sup>

Examining other methods by which it is sought to undermine the credibility of complainants, Rock observed that there is little that counsel is not allowed to say so that “as a matter of course, and in the most ordinary trial, gravely wounding allegations would be put to witnesses”.<sup>120</sup> Ultimately, he concluded that prosecution witnesses perceive cross-examination as “an assault on their identity”.<sup>121</sup> Brereton

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<sup>111</sup> *Ibid.* at p 70.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.* at p 83.

<sup>114</sup> *Ibid.* at pp 29, 30.

<sup>115</sup> *Ibid.* at p 30.

<sup>116</sup> *Ibid.* at p 36.

<sup>117</sup> *Ibid.* at p 72.

<sup>118</sup> Brereton (1997), p 254.

<sup>119</sup> *Ibid.*

<sup>120</sup> Rock (1993), pp 86, 88.

<sup>121</sup> *Ibid.* at p 34.



similarly found that defence counsel cast all sorts of aspersions about complainants, drawing into question such matters as their drinking and drug-taking habits and their mental or emotional stability.<sup>122</sup> He also noted that complainants, particularly assault complainants, were likely to be asked about their prior criminal record, even where this bore little relevance to the case at hand.<sup>123</sup> Brereton concluded that issues relating to the complainant's character and credit were just as likely to be raised in assault trials as in rape trials.<sup>124</sup>

Brereton makes the further point that, often, the information used to discredit complainants is of little proper relevance to the case at hand.<sup>125</sup> Pattenden supports this finding, arguing that "much information about the character of complainants and of third parties which is at present admissible is of little value".<sup>126</sup> In addition, not only do commentators dispute the relevance of much of the evidence being brought in to discredit complainants, there is also considerable evidence that this information is often quite untrue. Rock cites one case where the female victim of an assault was accused, without grounds, of lying, taking drugs, being drunk, and being provocative.<sup>127</sup> Shocked, she demanded:

How can he imply we were doing something with absolutely no proof? How can he do that? Can he do that, suggest that we were taking drugs when we weren't? It's total rubbish!<sup>128</sup>

It seems that, as in rape trials, the purpose of introducing defamatory character evidence in non-sexual offence trials is to prejudice the court against the complainant. Again, the rationale is that condemnation of the victim will mean acquittal for the assailant. Pattenden says that experiments on simulated juries bear this out, showing a direct relationship between the attractiveness of the victim in terms of character traits and social attributes and the determination of guilt.<sup>129</sup> Therefore, it is clearly in the defence's best interests to paint the complainant in an unfavourable light, even if this means distorting or bypassing the truth.

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<sup>122</sup> Brereton (1997), p 253.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> Pattenden (1986), p 374. Pattenden contrasts this with the situation in some US jurisdictions where impeachment is limited to proof of character for dishonesty or lying (*loc. cit.* at p 373).

<sup>127</sup> Rock (1993), p 35.

<sup>128</sup> *Ibid.*

<sup>129</sup> Pattenden (1986), p 376.

All in all, studies examining the trial experience of non-rape victims contradict the assumption inherent in traditional rape literature that only rape victims have their character denigrated during cross-examination. As McBarnet says, cross-examination is an integral part of the trial and is essentially about discrediting the testimony of opposing witnesses. Therefore, she explains, discrediting techniques are not something specially reserved for rape victims in particular or even victims. Rather, “everyone who enters the witness box is ‘a victim’ of the court in this sense”.<sup>130</sup>

#### 1.2.2.2 *Blaming the Victim*

[T]rials are about morals and deserts as well as the law. Juries were sometimes thought to believe that certain victims, shown to be the kinds of people they were, were really entitled to no protection under the law.<sup>131</sup>

Just as they stand to have their credibility attacked, studies reveal that victims in all types of case are also likely to find themselves being blamed for the incident in question. Brereton, for example, observed that a great deal of irrelevant material is introduced to the court to suggest that a particular complainant *deserved* what happened to him or her.<sup>132</sup> Similarly, Rock found that defence counsel frequently cast victims as “*culpable* as the defendant”.<sup>133</sup>

Integral to this victim-blaming exercise is the ‘deserving’ or ‘ideal’ victim philosophy which, Shapland *et al* report, features heavily in all types of criminal case. They explain that this is because the present system has retained the necessary tradition of prosecuting an individual offender for a particular offence and has therefore had to retain some notion of a person against whom the offence has been committed.<sup>134</sup> This person, they say, is the ‘ideal’ victim and is portrayed in the substantive and procedural criminal law as passive and inert, playing no part in any action prior to or during the commission of the offence.<sup>135</sup> Should a particular victim fail to conform to

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<sup>130</sup> McBarnet (1983), p 294.

<sup>131</sup> Rock (1993), p 52.

<sup>132</sup> Brereton (1997), p 253.

<sup>133</sup> Rock (1993), p 72. (Emphasis added.)

<sup>134</sup> Shapland, Wilmore and Duff (1985), p 188.

<sup>135</sup> *Ibid.* at p 66.



this ideal, then there is a tendency in practice to switch to an idea of the “provocative” victim - the victim as sharing blame for the offence.<sup>136</sup>

Brereton observed that, in order to exploit this tendency, defence counsel endeavour to contrast “explicitly or implicitly” a particular complainant’s conduct and character with that of the “legitimate” or “deserving” victim.<sup>137</sup> And in this regard, he concludes, the line of questioning in non-rape trials bears “marked similarities” to the strategy used in rape trials.<sup>138</sup> Rock’s findings bear this out. He describes how the victim of a knife attack was accused of cheating, plotting, drunkenness, vindictiveness, quarrelling, muddle, and mendacity and all “as a matter of course and in a few minutes”.<sup>139</sup> Again, in a “quite routine case of assault” on a woman, he reports that doubts were cast on her truthfulness, her language, her aggressiveness, her self-discipline, her sobriety, and her conduct.<sup>140</sup> In his closing speech, counsel called the complainant a “spiteful, bitchy woman with a drink problem”.<sup>141</sup> It can be seen in these cases that defence counsel is painting a picture of the complainant which is far removed from the ideal victim stereotype.

The prolixity of the accusations levelled against individual complainants suggests that they are unlikely to be true. In support of this, Rock observed that the accusations made are dictated largely by the nature of the case - they are “standard fare” for that case-type - with the same line being taken by any lawyer handling such a case.<sup>142</sup> Basically, Rock explains, lawyers resort to a set of “operating typifications” whereby witnesses are translated into routine categories and are then subjected to the routine attacks that these categories warrant.<sup>143</sup> In this way, “a unique offence, offender, and victim [are] subjected to a round of *formulaic* defence attacks”.<sup>144</sup> Brereton, too, observed that the manner in which complainants are “delegitimised” depends on the nature of the trial.<sup>145</sup> Thus, he explains, rape complainants are “likely to be painted as

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<sup>136</sup> *Ibid.* at pp 66, 67.

<sup>137</sup> Brereton (1997), p 254.

<sup>138</sup> *Ibid.*

<sup>139</sup> Rock (1993), p 83.

<sup>140</sup> *Ibid.* at p 88.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.* at p 83. (Emphasis added.)

<sup>145</sup> Brereton (1997), p 254.

sexually provocative risktakers, and/or as persons of suspect morality who d[o] not live a normal lifestyle".<sup>146</sup> An assault complainant, on the other hand, stands to be depicted as a "trouble-maker or a bully who 'gave as good as he got' and deserved what happened to him".<sup>147</sup> But, Brereton insists, these differences in content should not be allowed to obscure the very substantial similarities in the form and structure of questioning designed to impute blame to complainants in both rape and non-rape trials.<sup>148</sup> Similarly, McBarnett argues that the only influence of gender and offence-specific factors is in helping to determine the particular form which degradation of the victim takes.<sup>149</sup>

The Advisory Committee on the US Federal Rules of Evidence explain that the victim-blaming exercise works largely by

...distract[ing] the trier of fact from the main question of what actually happened on the particular occasion. *It subtly permits the trier of fact to reward the goodman and to punish the badman because of their respective characters* despite what the evidence in the case shows actually happened.<sup>150</sup>

Because the outcome of a case then depends on whether the complainant is characterised as a "goodman" or a "badman", defence counsel will invariably endeavour to depict him or her as a "badman". As with the discrediting exercise, the truth of the accusations aimed at doing such are quite irrelevant. Indeed, it may be that the objective can only be achieved by foregoing reality.

It can be seen, therefore, that the various studies examining the trial experience of non-rape victims oppose the assumption inherent in most rape literature that only rape victims stand to have their character and conduct blackened as defence counsel seek to impute blame to them. The reality is rather that victims in all kinds of case are likely to find themselves being blamed for the incident in question.

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<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> McBarnett (1983), pp 293-303.

<sup>150</sup> Federal Judicial Centre (1979), p 27. (Emphasis added.)



### 1.2.2.3 *Harassing the Victim*

[C]ross-examination would lean on the reiterated question, put over and over again and more aggressively, in a manner quite alien to mundane conversation...<sup>151</sup>

On top of vigorous attempts to discredit and blame them, research reveals that victims in all kinds of case are also subject to deliberate harassment during cross-examination. Rock, for example, observed that complainants may be questioned relentlessly, the same question being asked repetitively and more and more aggressively.<sup>152</sup> In fact, he concluded that questions asked during cross-examination came across more as “sure statements”.<sup>153</sup> The effect, he observed, is to suggest to the court that the dispute is attributable solely to the witness’s reluctance to admit the truth, rather than to the fact that he or she is actually telling the truth.<sup>154</sup> In addition, Brereton observed that complainants undergo relentless questioning about inconsistencies between their trial evidence and statements which may have been made months earlier to the police or in other court hearings.<sup>155</sup> He explains that this is, in fact, one of the most important and commonly used of the barrister’s “tools of trade”.<sup>156</sup> He reveals that lawyers consider this to be a “bread and butter” cross-examination tactic which is used in any case where the opportunity arises.<sup>157</sup> Brereton explains that the primary objective behind this type of questioning is to undermine the complainant’s testimony and general credibility.<sup>158</sup>

Cross-examining witnesses about previous inconsistent testimony is generally permissible under the laws of evidence as relevant to the issue of credit.<sup>159</sup> However, it is clear that defence counsel are exploiting this freedom so that questioning takes place which amounts to harassment. This can be seen from the types of questions which are asked in this regard. Brereton observed that much of such questioning focuses on “secondary details” of the incident in question rather than on the act as a

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<sup>151</sup> Rock (1993), pp 59, 60.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.* at p 60.

<sup>155</sup> Brereton (1997), p 255.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.* at p 244.

<sup>158</sup> *Ibid.* at p 256.

<sup>159</sup> *Ibid.* at p 255.

whole.<sup>160</sup> Moreover, defence counsel seize on minor discrepancies between the complainant's evidence in court and on previous occasions.<sup>161</sup> McEwan similarly observed "valuable witnesses" being "relentlessly questioned on matters which by no stretch of the imagination had any useful part to play in the proceedings".<sup>162</sup>

It seems, then, that defence counsel are able to undermine the credibility of witnesses by exploiting even the most trivial discrepancies in their testimony. In addition, relentless questioning of this kind is very oppressive, causing victims to feel bullied and manipulated, the impact on particularly fragile witnesses being especially severe. Therefore, a further motive behind this kind of treatment is clearly to cause complainants as much distress as possible so that their performance in the witness-box is impaired.

Once again, the assumption inherent in traditional rape literature that only rape victims undergo certain kinds of questioning in the witness-box is disproved for just as rape complainants face relentless questioning about prior inconsistencies in their evidence, so too do non-rape victims. Brereton's study explicitly bears this out for, comparing the questioning undertaken in this regard in an assault trial with that undertaken in a rape trial, he concluded that the general structure of the questioning in the two samples was remarkably similar.<sup>163</sup> Similarly, in his study on the structure and logic of courtroom "talk", Matoesian noted that "generating inconsistent testimony...functions as a generic courtroom tactic" and "operates across a broad spectrum of offences".<sup>164</sup>

### *Summary*

As explained, a major focus of rape literature is the complainant's cross-examination experience. Heavy criticism is directed at the way in which this victim-group is routinely vilified, denigrated and humiliated as defence counsel endeavour to discredit, blame and unsettle them. All in all, the various cross-examination tactics

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<sup>160</sup> *Ibid.* at p 256.

<sup>161</sup> *Ibid.*

<sup>162</sup> McEwan (1992), p 17.

<sup>163</sup> Brereton (1997), p 256.

<sup>164</sup> Matoesian (1993), p 20.



utilised in rape cases have given rise to the repeated criticism that it is the complainant and not the defendant who is on trial:

[V]ictims of rape deciding to pursue cases through legal channels have faced discrimination by and trauma from excessive scrutiny of their behaviour, credibility, demeanour, resistance, and provocation. The net effect has been to shift the burden in rape cases from demonstrating the offender's guilt to demonstrating the victim's innocence.<sup>165</sup>

The previous exposition of the type of treatment which rape complainants routinely experience during cross-examination leaves little doubt that this image of brutality is true. Indeed, the complaint that rape victims are raped for a second time in court seems well founded.<sup>166</sup>

However, the previous discussion also revealed that non-rape complainants are equally subject to an extremely arduous cross-examination ordeal. In fact, it was shown that they endure an almost identical experience, suffering vicious attacks on their character and conduct as it is sought to discredit and blame them.<sup>167</sup> Researchers comment that non-rape victims, too, experience cross-examination as an "assault on their identity", putting them "on trial" and making them "feel like a criminal".<sup>168</sup> Ultimately, then, the previous discussion challenges the common assumption of most rape literature that rape complainants are subjected to forms of brutality during cross-examination which would not be tolerated in other trial contexts. The following section examines whether this 'equal injustice' extends also to the treatment experienced by rape and non-rape victims at the hands of prosecuting counsel.

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<sup>165</sup> Caringella-MacDonald (1985), p 66.

<sup>166</sup> Lees, for example, remonstrates that rape trials are a "cruel hoax" and "equivalent to a second rape by the judiciary and legal profession" (1989a, p 10).

<sup>167</sup> It was shown that non-rape victims are just as likely as rape victims to endure *discrediting*, *blaming* and *harassing* tactics. However, whilst evidence exists that victims in non-sexual offence cases are also frequently *humiliated* during cross-examination, it is felt that such a tactic is arguably more prevalent in rape cases given the particularly conducive nature of the issues involved. It is hoped that the reader will appreciate, certainly by the end of Chapter Two, that cross-examination is largely a tactical exercise by which counsel endeavour to *win* their case. To this end, counsel vary the tactics from case-type to case-type in order to exact the most effective defence possible. Therefore, questioning aimed at humiliating the complainant seems to be the special preserve of sensitive cases such as rape.

### 1.3 Prosecution

#### 1.3.1 Rape Trials

Whilst defence counsel attract by far the greatest adverse attention in rape literature, the way in which prosecutors discharge their role also comes in for considerable criticism. Much of this criticism centres around the fact that the prosecutor is not the complainant's personal legal representative. Patullo, for example, remonstrates:

[The complainant] is just the witness in the case in which she must prove her innocence. She has no counsel to represent her and no one to defend her. She is, in judicial terms, out there alone.<sup>169</sup>

This procedural aspect of the trial process is seen to have a severely detrimental impact on the rape complainant's experience in court. One major effect is that, because they are unrepresented, complainants feel isolated and vulnerable. Chambers and Millar observed that many women "felt vulnerable in court when they realised that there was no one there specifically to protect their interests at the trial".<sup>170</sup> In another study, they again noted complainants's "feelings of vulnerability in court as a consequence of having no one on their 'own side' to protect their interests".<sup>171</sup>

In addition, serious practical difficulties result from the fact of having no personal representation. Lees explains that prosecuting counsel is not allowed to meet the complainant before the trial or even to speak to her on the day of the court hearing.<sup>172</sup> Sometimes prosecutors do introduce themselves, she says, but this is not encouraged.<sup>173</sup> This complete lack of meaningful contact with the complainant is seen to account for her unpreparedness for the rigours of the trial process. Chambers and Millar, for example, report that complainants were generally of the opinion that to have known something about court procedures and what was expected of them in the role of main prosecution witness would have considerably reduced the feeling of fear and anxiety which built up before their court appearance.<sup>174</sup> In turn, they believed that such knowledge would have gone a long way towards reducing nerves and as a result

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<sup>168</sup> Rock (1993), p 35.

<sup>169</sup> Patullo (1983), p 18.

<sup>170</sup> Chambers and Millar (1986), p 92.

<sup>171</sup> Chambers and Millar (1987), p 64.

<sup>172</sup> Lees (1996), p 106.

<sup>173</sup> *Ibid.*

<sup>174</sup> Chambers and Millar (1986), p 84.



would have improved their performance in court because they would have felt more prepared and less tense when giving evidence.<sup>175</sup>

Perhaps the gravest criticism is that because the prosecutor is not the complainant's personal representative, this negatively affects the way in which he performs his prosecutorial function. Lees, for example, noted that the failure to allow the complainant in rape trials to meet with the prosecution beforehand "results in a highly *disinterested* representation on the woman's behalf".<sup>176</sup> Chambers and Millar similarly observed that the complainant's "expectations of advocacy contrasted sharply with the *impartiality* and *detachment* which was in fact the hallmark of prosecution decision-making".<sup>177</sup> This, they say, led many women to contrast the fiscal's impartial position with the interventionist role of the defence agent or advocate.<sup>178</sup> Regarding this contrast, Chambers and Millar explain that whilst the prosecution has responsibility for presenting the complainant's evidence because she is the main prosecution witness, there is not the same "singleness of purpose" as exists in the relationship between the defence lawyer and the accused.<sup>179</sup>

The prosecutor's disinterestedness is seen to manifest itself in a wholly inadequate presentation of the complainant's case. Lees claims that the prosecution don't ask relevant questions, for example.<sup>180</sup> She reports that there are several areas which are usually neglected, for example, the circumstances of the alleged rape; the location of the intercourse; the effect of the incident on the woman's life; the character of the defendant, and the trauma and dangers involved in bringing the case to court.<sup>181</sup> Lees further reports that prosecutors fail to cross-examine the defendant effectively. She refers to one case in which the prosecutor failed completely to challenge the defendant on testimony betraying "not only woman-hating attitudes but an aggressive and contemptuous attitude towards the woman herself".<sup>182</sup> She also points out that

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<sup>175</sup> *Ibid.*

<sup>176</sup> Lees (1996), p 108. (Emphasis added.)

<sup>177</sup> Chambers and Millar (1986), p 131. (Emphasis added.)

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.* at p 95.

<sup>180</sup> Lees (1989b), p 14.

<sup>181</sup> *Ibid.* at pp 14, 15.

<sup>182</sup> *Ibid.*

crucial inconsistencies in the defendant's testimony are frequently not taken up by the prosecution.<sup>183</sup>

Lees also accuses prosecuting counsel of lacking sympathy for the complainant which, she says, can prejudice the woman's case.<sup>184</sup> She describes how, in one case, despite evidence from several police officers, including a police surgeon, that the complainant was in acute distress and showing every sign of having been raped, prosecuting counsel failed even to mention the woman's distress in his summing-up. When Lees asked him why he had not done so, he replied that it was absurd to regard the woman's state as important as she could be faking distress.<sup>185</sup> Soothill and Soothill similarly observed that prosecutors lack sympathy for the complainant and to such an extent that they actually participate in blaming her for what happened. They found in this respect that

...respective counsels seem to collude in their assessments of the parties concerned and so battle commenced with certain shared assumptions which clearly undermined the position of the complainant.<sup>186</sup>

They reveal that out of the sixteen rape cases which they looked at in 1985, seven instances of "woman blame" came from the prosecution. They listed the most striking example as being the case which attracted the second greatest amount of coverage during that year. In that case, the prosecutor was quoted as apologetically pointing out that "It would have been better if these girls had been tucked up in bed".<sup>187</sup>

Another criticism is that prosecutors fail to protect rape complainants from brutality during cross-examination. Chambers and Millar, for example, noted that complainants felt "particularly let down" by the prosecution, who they thought "could have acted in a more robust way to provide protection from defence questioning".<sup>188</sup> Lees blames the lack of contact between prosecutor and complainant which, she says, gives rise to disinterestedness.<sup>189</sup> Chambers and Millar similarly conclude that it is the prosecutor's "impartiality" which leaves complainants "open to attack" and creates

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<sup>183</sup> Lees (1996), p 108.

<sup>184</sup> *Ibid.* at p 124.

<sup>185</sup> *Ibid.*

<sup>186</sup> Soothill and Soothill (1993), p 22.

<sup>187</sup> *Ibid.* at pp 21, 22.

<sup>188</sup> Chambers and Millar (1987), pp 64, 65.



“an imbalance in the conduct of trials and in the way evidence [i]s presented”.<sup>190</sup> They explain that there is simply no one acting solely to protect the complainant’s interests by, for example, seeking to prevent her character being maligned or being unfairly harassed.<sup>191</sup>

Prosecuting counsel in rape cases come in for further criticism for their role in the plea-negotiation process.<sup>192</sup> In their Scottish study, Chambers and Millar found that approximately one-quarter of all sexual offence convictions were obtained on lesser charges resulting from private negotiations between the defence agent and the prosecution in relation to plea.<sup>193</sup> They found the most common form of plea-negotiation to be the deletion, at the suggestion of the defence agent, of clauses or phrases from the common law charges which had the effect of lessening the charge.<sup>194</sup> Sometimes this even resulted in the removal of the sexual element of the offence.<sup>195</sup> In a recent Home Office study, Harris and Grace revealed that plea-bargaining, or “horse trading” as one judge called it, “often” takes place in English Crown Courts too.<sup>196</sup> In 1996, for example, twenty-four per cent of defendants pleaded not guilty to the principal charge of rape, but guilty to a lesser charge. Over three-quarters of these defendants were convicted of those charges only, indicating a form of plea-bargaining between the prosecution and the defence.<sup>197</sup>

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<sup>189</sup> Lees (1996), p 106.

<sup>190</sup> Chambers and Millar (1986), p 131.

<sup>191</sup> *Ibid.* at p 95.

<sup>192</sup> Ashworth explains that there are three types of plea-negotiation: the charge bargain, the fact bargain, and the plea bargain (1994, pp 261-270). The charge bargain occurs when the defence offers to plead guilty to a lesser charge or the prosecution offers to accept a plea of guilty to a lesser charge. The fact bargain occurs when the defendant agrees to change his or her plea to guilty on the faith of a promise by the prosecution to state the facts of the case in a particular way - clearly the way in which the facts are presented can have an effect on sentencing. Finally, the plea-bargain occurs as the result of an understanding on the part of the defendant that he will receive a lower sentence as a result of pleading guilty.

<sup>193</sup> Chambers and Millar (1986), p 131.

<sup>194</sup> *Ibid.* at p 132.

<sup>195</sup> Lees found that the police, too, are responsible for this “downgrading” of the victim’s suffering, sometimes reducing cases of attempted rape to indecent assault and on two occasions, reclassifying rape to indecent assault. She also found a case of indecent assault which was reduced to indecent exposure and in ten cases, the sexual assault element was removed altogether. Lees comments:

Clearly, it is in the interests of the victim to reduce the charge if there is insufficient evidence to proceed with the more serious charge; such decisions have to be made on the basis of experience and judgement. However, some of the cases in which the sexual assault classification was removed altogether are rather puzzling (1996, p 99).

She cites one case which was classified as grievous bodily harm even though the attacker had ripped off the victim’s tee-shirt and bra and put a finger in her vagina, slashing her breasts while threatening to cut them off (*loc. cit.*).

<sup>196</sup> Harris and Grace (1999), p 32.

<sup>197</sup> *Ibid.* at pp xii, 32.

Whilst plea-negotiation is indeed one way of reducing the trauma experienced by the rape victim - a negotiated plea will mean that the trial is avoided and so she will not have to give evidence - it does not always meet with her approval. There are a number of reasons for this. First of all, as Lees explains:

It is not much comfort to a victim of attempted rape or sexual assault to have the case expedited and her own role in the trial made less traumatic, merely to see her attacker charged with a minor offence and given a trivial sentence.<sup>198</sup>

She goes on to say that interviews conducted with victims revealed how “shocked” and “insulted” many complainants were at the lenient sentences frequently meted out to their attackers.<sup>199</sup> Chambers and Millar explain that a second reason why rape victims disapprove of plea-negotiation is that it prevents them from having their side of the story heard. They report that complainants felt “cheated at not being able to give evidence” and “annoyed at the prosecutor’s acceptance of only a partial guilty plea”.<sup>200</sup> A number of women, they reveal, felt that they wanted more say prior to sentencing and that the absence of a trial had deprived them of the opportunity of having their view put before the court.<sup>201</sup> In fact, Lees found that not being able to describe the rape or her anguish is one of the aspects of rape trials that complainants find the most frustrating.<sup>202</sup> A third reason that rape victims are unhappy to have their case settled by way of plea-negotiation is because this is generally done without any consultation being made with them.<sup>203</sup> Instead, they result from private negotiations between defence counsel and the prosecutor.<sup>204</sup> This causes complainants to feel excluded from the decision-making process, even though the outcome is crucially important to them. In this way, the complainant’s feeling of being “peripheral to the key relationship at a trial, that between the state as representing the ‘public interest’ and the accused” is exacerbated.<sup>205</sup> Further to this, excluding complainants from the plea-negotiation process promotes the frustration and lack of acceptance referred to above. Chambers and Millar observed, for example, that some women in their study were aggrieved about charges being dropped which they thought were relevant.<sup>206</sup>

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<sup>198</sup> Lees (1996), p 102.

<sup>199</sup> *Ibid.*

<sup>200</sup> Chambers and Millar (1986), p 132.

<sup>201</sup> *Ibid.*

<sup>202</sup> Lees (1996), pp 106, 107.

<sup>203</sup> Chambers and Millar (1986), pp 131, 132.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.* at p 94.



### *Summary*

The previous discussion highlighted the fact that prosecutors attract serious criticism for the way in which they carry out their prosecutorial function in rape trials. It was shown that prosecutors are disinterested, unsympathetic and ineffective leaving complainants feeling vulnerable, excluded and unrepresented. The question now is whether non-rape victims experience the same problems in relation to their treatment by prosecuting counsel.

#### **1.3.2 Other Trial Contexts**

As previously explained, the dominant perspective in most rape literature is that rape complainants are treated differently from non-sexual offence complainants. This perspective was illustrated with regard to the issue of cross-examination; it extends also to the conduct of prosecuting counsel in that the perceived inadequacies in how he discharges his role are presented as if unique to rape cases. However, an important proposition of this present study is that the non-comparative approach taken in most rape literature results in the rape complainant's treatment being misrepresented. This has already been demonstrated with regard to the issue of cross-examination for it was shown that non-rape victims undergo many of the very same abuses during this process as do rape victims. Similarly, research conducted into the experience of victims as a whole casts serious doubt on the assumption that only rape victims have cause to complain about the conduct of prosecutors. Jackson, for example, explains that "there is now increasing frustration on the part of victims that justice is being denied to them at court because of the way their cases are dealt with by lawyers".<sup>207</sup>

An essential preliminary point in this regard is that *no* victim enjoys personal legal representation for, regardless of case-type, the prosecutor represents the *public* interest and not specifically that of the victim. In this way, all victims are simply witnesses for the Crown and, as such, enjoy no special status whatsoever. This is a fact which is rarely made explicit in traditional rape literature. Instead, misleading statements such as the following are made:

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<sup>206</sup> *Ibid.* at p 133.

<sup>207</sup> Jackson (1997), p 5.

In court, a woman who has complained of rape is almost entirely isolated. She has no barrister to represent her interests. She is not allowed to consult the prosecution barrister before the trial. She may not even see her statement.<sup>208</sup>

Invariably, the uninformed reader is left with the view that this state of affairs is unique to rape complainants whereas, as stated, *no* complainant is personally represented. Consequently, victims as a whole experience the same sense of isolation, of being on the periphery, as do rape victims. This was observed by Rock who states that “witnesses could not understand why they were so *shunned* by the lawyers whom they supposed to act for them”.<sup>209</sup>

Research shows that non-rape victims experience also the same practical difficulties as rape victims through not having their own legal representation. For example, Jackson *et al* found that the majority of prosecution witnesses (including victims) felt that not enough had been done to prepare them for their case and that they did not have a sufficient understanding of what was going to happen in court, with only thirty per cent saying that they had received some explanation about this.<sup>210</sup> This lack of preparation is attributable largely to the fact that prosecuting counsel do not consult with victims prior to trial. In addition, Jackson *et al* found that the predominant reaction of victims on receiving their summons was one of worry or anxiety, for reasons such as having to appear publicly in court to give evidence and of giving evidence against the defendant.<sup>211</sup> In light of this, it is inevitable that the almost complete lack of consultation with victims leads also to heightened anxiety and diminished performance in the witness box.

Shapland *et al* observed that despite often very belligerent cross-examination, victims tend not to blame defence counsel because they more or less expect to be treated in such a manner.<sup>212</sup> They found, however, that victims feel very disappointed and angered by the prosecutor’s treatment of them. Some victims commented on the prosecutor’s apparent disinterest in the case. Others complained that he did not seem well-prepared, did not emphasise the right points or did not protest when the defence

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<sup>208</sup> Lees (1989b), p 14.

<sup>209</sup> Rock (1993), p 177. (Emphasis added.)

<sup>210</sup> Jackson, Kilpatrick and Harvey (1991), p 86.

<sup>211</sup> *Ibid.* at p 55.

<sup>212</sup> Shapland, Willmore and Duff (1985), p 65.



was casting doubts on their story.<sup>213</sup> Ultimately, Shapland *et al* report, the prosecutor was identified as “the most unsatisfactory courtroom participant as far as victims were concerned”.<sup>214</sup> It can be seen that these criticisms echo those voiced in the context of the rape trial.

Aside from prosecuting counsel’s perceived ineffectiveness, McBarnet found that he is also guilty of abusing victims. She claims that “the *degradation* of witnesses in court is not just something meted out by their adversaries” but, rather, victims can find themselves treated just as “abruptly”, “unpleasantly” and “suspiciously” by “their own side”.<sup>215</sup> She observed, for example, that victims look “visibly aggrieved and frustrated as they are abruptly cut off in full flow by prosecutors”.<sup>216</sup> Rock similarly found that prosecutors “steer[ed] their witnesses forcibly and peremptorily”, telling them to modulate their delivery, adhere to what was thought relevant, abstain from commentary, and cut short evidence that flouted the hearsay rule.<sup>217</sup>

In addition to the embarrassment which being treated so abruptly must obviously cause, Rock explains that victims feel aggrieved by this treatment because it prevents them from recounting their own history as they would like.<sup>218</sup> In fact, it seems that victims generally feel very strongly that the actual offence is neither accurately nor fully presented, particularly at the sentencing stage and in cases which have been settled by way of plea-negotiation. With regard to plea-negotiation, Jackson *et al* observed that those who complained most were assault victims who felt that the extent of their injuries were not stressed sufficiently by the prosecution. They report that, when they heard the scanty account that was given of their injuries by the prosecution, the initial attitude of relief at not having to give evidence expressed by these witnesses changed to one of annoyance at the lack of opportunity to put their side of the picture.<sup>219</sup> We recall that rape complainants similarly feel that the conduct of the trial denies them adequate opportunity to put their view before the court; the

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<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.* at p 67.

<sup>215</sup> McBarnet (1983), p 295. (Emphasis added.)

<sup>216</sup> *Ibid.*

<sup>217</sup> Rock (1993), p 177.

<sup>218</sup> *Ibid.*

<sup>219</sup> Jackson, Kilpatrick and Harvey (1991), p 109.

practice of plea-negotiating is seen as robbing them completely of any such opportunity.

With regard to sentencing, Jackson *et al* found that those victims who were most aggrieved were again those who had been personally injured. In their view, the sentence imposed did not reflect the severity of the injuries inflicted and this was seen to be the result of the prosecutor's failure to emphasise them sufficiently.<sup>220</sup> Jackson provides the example of a man who suffered severe injuries to his head and neck after his home was broken into by three men who bore him a grudge.<sup>221</sup> The men were charged with the serious offence of assault occasioning actual bodily harm for which they would have been likely to receive an immediate custodial sentence. The prosecutors in the case, however, reduced the charges to common assault and the case was dealt with in the magistrate's court instead of the Crown Court. The men pleaded guilty to this lesser charge and instead of a prison sentence they received a conditional discharge.

### *Summary*

As explained, prosecuting counsel attract considerable criticism for the way in which they discharge their prosecutorial function in rape trials. The previous discussion revealed the most prevalent criticisms in this regard. It was shown, for example, that prosecutors are "disinterested" and "detached" from the complainant and her grievance with the result that they present her case half-heartedly, make no effective challenge of the defence case, fail to protect her from the brutality of cross-examination and generally fail to represent or take into account her interests.

However, the previous discussion also revealed that victims of all kinds of crime feel very dissatisfied with the way in which prosecuting counsel handle their grievance in court. In fact, the criticisms outlined in respect of non-rape trials can be seen to reflect exactly those voiced in the context of rape cases. Once again, therefore, the presumption inherent in most rape literature that rape complainants are subjected to singular maltreatment is challenged. The following section examines whether this

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<sup>220</sup> *Ibid.* at p 117.

<sup>221</sup> Jackson (1997), pp 5, 6.



assumption can be challenged also in respect of how the judiciary conduct themselves in a rape trial.

## **1.4 Judicial Intervention**

### **1.4.1 Rape Trials**

The judiciary also comes in for considerable criticism from rape commentators. One significant complaint is that trial judges fail to protect rape victims from the brutality of cross-examination. Temkin, for example, demands to know “where are the judges?” when rape victims are being abused by defence counsel.<sup>222</sup> She argues that while it is for judges to control the conduct of the trial, “in rape cases, they appear all too often to have given defence counsel free rein”.<sup>223</sup>

Chambers and Millar’s empirical research bears this criticism out. They observed that the judges in their study “rarely” intervened to prevent defence counsel from asking questions which were likely to cause the complainant undue distress.<sup>224</sup> Moreover, they noted that the judges frequently failed to prevent counsel from asking even those questions which were inadmissible.<sup>225</sup> Overall, Chambers and Millar observed only *three* clear-cut examples in their whole study of objections being raised to defence counsel’s cross-examination of the complainant and these were raised, not by the presiding judge, but by the prosecution for consideration by the judge.<sup>226</sup> Furthermore, they emphasise that in none of these instances did the trial judge uphold the objection - in one case the objection was conclusively rejected and in the other two cases the outcome of the judge’s involvement was not clear but resulted in only a limited restriction of defence counsel’s questioning.<sup>227</sup> Chambers and Millar concluded that it might have been expected that the judges would have made more objections to defence questioning since there were “many instances where the complainant was clearly very distressed” and, moreover, “there was much questioning about matters which appeared to be transgressions of the existing rules of evidence”.<sup>228</sup>

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<sup>222</sup> Temkin (1987), p 7.

<sup>223</sup> *Ibid.*

<sup>224</sup> Chambers and Millar (1986), p 123.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.* at pp 125, 126.

<sup>228</sup> *Ibid.* at p 123.

The criticism that trial judges don't do enough to protect rape complainants from the cruelties of cross-examination is perhaps strongest with regard to the issue of sexual history evidence. This is because it is widely considered that this type of questioning causes rape complainants more distress and humiliation than any other aspect of the cross-examination process.<sup>229</sup> Yet, despite the trauma caused to complainants and the judicial obligation to curtail this type of questioning, the judiciary is considered to offer little protection in this regard.<sup>230</sup> Research conducted by Adler, for example, revealed that defence counsel frequently ask questions relating to the complainant's sexual past without first making the requisite application to the trial judge.<sup>231</sup> Nevertheless, she reports, in the majority of such instances the judge failed to intervene in any way so that the defence was free to ask a number of questions expressly prohibited by the Sexual Offences (Amendment) Act 1976.<sup>232</sup> Barbara Hewson QC claims that, in fact, "a defence barrister more or less has an expectation that a judge will allow him to go fishing around in the victim's past".<sup>233</sup>

### *Summary*

The previous brief discussion highlighted the criticism that the judiciary do not protect rape complainants from the cruelties of cross-examination. Given the distress which is invariably caused by questioning of the type outlined in section 1.2.1 above and particularly by questioning on sexual matters (Chapter Three, section 3.2), it is certainly arguable that trial judges should be intervening much more to protect rape complainants. This lack of intervention is all the more remarkable where the questioning involved is in breach of the rules of evidence. Whether the judiciary is similarly remiss in non-rape cases will now be examined.

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<sup>229</sup> Due to the specific theme of each chapter in this thesis, the topic of sexual history evidence was not addressed in section 1.2.1 of this chapter but is reserved for discussion in Chapter Three, section 3.2 below. However, it is pertinent to mention it briefly in the present context.

<sup>230</sup> The judicial obligation to regulate the introduction of sexual history evidence was created by section 2 of the Sexual Offences (Amendment) Act 1976. However, due to poor adherence to the spirit of this measure, it has been replaced by section 41 of the Youth Justice and Criminal Evidence Act 1999, a much less discretionary provision. The likely impact of section 41 on the introduction of this type of evidence is discussed in Chapter Five of this thesis.

<sup>231</sup> Adler (1982), p 674.

<sup>232</sup> *Ibid.*

<sup>233</sup> Barbara Hewson QC, interview in October 1993 for the Channel Four *Dispatches* programme, shown in February 1994.



#### 1.4.2 Other Trial Contexts

It was shown above that the judiciary comes in for considerable criticism for failing to intervene to prevent the harassment and humiliation of rape complainants during cross-examination. In keeping with the assumption that rape victims are treated differently than victims as a whole, this literature implies that it is only in rape trials that judges take this non-interventionist stance. However, it seems that this perspective is incorrect and that, in fact, trial judges don't do enough to protect victims in all case-types.

It is possible to infer this simply from the fact that questioning of the type outlined in section 1.2.2 above goes on. That is, if the judiciary were intervening more often to prevent undue distress being caused to victims, then the use of deliberately upsetting cross-examination tactics would invariably be curtailed. Rock's empirical findings bear this out. He observed that whilst judges did occasionally reprove counsel for irrelevance and for being unduly offensive or vexatious, they did not conceive it be their duty generally to defend witnesses: "It's not our business to protect witnesses. That's not our business at all".<sup>234</sup> The ultimate consequence of this stance, Rock explains, is that "counsel were given great latitude" in what they might say to a witness so that victims and other witnesses were very often distressed about the imputations that were made about them.<sup>235</sup>

This lack of intervention on the part of trial judges was observed also by the Royal Commission on Criminal Justice.<sup>236</sup> Following investigation into the trial process, the Commission observed that harassment and intimidation of witnesses, including expert witnesses, does go on but that the judiciary does not always act quickly enough to prevent this.<sup>237</sup> Accordingly, the Commission urged that the judiciary take a "more interventionist approach".<sup>238</sup> As such, emphasising that it is they who are "in charge of the trial", the Commission insisted that judges must be prepared to intervene as and when necessary to expedite the proceedings, to see that witnesses are treated by

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<sup>234</sup> Rock (1993), p 87.

<sup>235</sup> *Ibid.* at p 88.

<sup>236</sup> Home Office (1993).

<sup>237</sup> *Ibid.* at para 12.

<sup>238</sup> *Ibid.* at para 43.

counsel as they should be, to curtail prolix or irrelevant questioning, and to prevent the jury being confused or misled.<sup>239</sup>

### *Summary*

As illustrated, the judiciary draws considerable criticism for failing to protect rape complainants from the brutality of cross-examination. This is certainly a legitimate criticism given the nature of the cross-examination ordeal in a trial for rape. However, the previous discussion also revealed that the judiciary takes a similarly non-interventionist stance in non-rape trials. Again, this is despite the fact of the very real abuses to which victims as a whole are subject during cross-examination. It can be seen, therefore, that the assumption underlying most rape literature - that rape complainants are subjected to differential treatment within the criminal justice system - is once again thrown into question.

## **1.5 Conclusion**

As explained, this thesis aims to explore the treatment of rape victims at court with a view to providing suggestions for improving their experience at this stage of the criminal justice process and also beyond. In order to facilitate this objective, this first chapter was concerned to delineate those aspects of the rape trial which give rise to severe criticism and which must, therefore, be addressed in any discussion on reform. Via a review of the literature on the topic, these areas of concern were shown to be the brutality of the cross-examination process and the joint inadequacy of prosecuting counsel and judiciary during the course of the trial.

The further crucial objective of this chapter was to examine the relationship between the trial experience of rape and non-rape victims. To this end, this chapter adopted a comparative methodology, measuring the treatment of rape victims in the above three areas against that accorded victims as a whole. It was shown that, contrary to the image presented in traditional rape literature, victims of non-sexual offences undergo much the same ill-treatment as do rape victims. With regard to cross-examination, for example, most rape commentators assume that rape victims are subject to forms of questioning which would not be considered acceptable in any other trial context.

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<sup>239</sup> *Ibid.* at para 2.



However, as Brereton explains, despite the very different fact situations which are involved, defence counsel in non-sexual offence cases use much the same tactics to win their case as are deployed in rape trials.<sup>240</sup> It was similarly shown that significant similarities exist between how prosecutors and judges conduct themselves in rape trials and in trials of a non-sexual nature.

This finding that rape and non-rape victims have a great deal in common in terms of their courtroom experience has critical implications for the question of why rape victims are treated as they are. That is, because most rape commentators assume that the maltreatment of rape victims is singular to them, they further assume that this treatment is the product of prejudicial attitudes specifically against this victim-group. However, in light of the similarities revealed throughout the course of this chapter, it is clear that one must look beyond attitudinal factors if one is to fully explain the treatment of rape complainants. With this in mind, the following chapter aims specifically to establish why rape victims are treated in the manner outlined in this present chapter. It is imperative that this issue is accurately determined if the ultimate objective of this thesis - the formulation of effective reform proposals - is to be achieved.

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<sup>240</sup> Brereton (1997), p 259.

## *Chapter Two*

### *Structural Defects*

#### *2.1 Introduction*

If the victim suffers at the hands of the criminal justice system it is in part at least because its fundamental function is not restitution or vengeance for the victim. The court is a symbol of law and order which must be upheld if necessary despite the victim's wishes. In that sense both offender and victim are pawns in a game about social power and the struggle for dominant definitions of reality.<sup>241</sup>

As explained, this thesis aims to explore the treatment of rape victims at court with a view to providing suggestions for improving their experience at this stage of the criminal justice process and also beyond. The central proposition of this thesis is that, if real improvement is to be achieved, it is imperative that the factors shaping the treatment of this victim-group are properly understood for it is these which any reform proposals must aim to address. It is, therefore, the specific function of this present chapter to establish the reasons behind the objectionable treatment of rape victims as outlined in Chapter One above.

The fact that the tribulations outlined in the previous chapter affect all victims equally is critical to understanding why they occur. This can be seen from the chain of reasoning followed in most rape literature. As explained, the tendency is to examine the treatment of rape victims without making any comparative reference to the experience of victims as a whole. Consequently, it is assumed that the difficulties experienced by rape victims are singular to them and, following from this, that a pronounced prejudice against this specific victim-group is to blame. However, this theory cannot account for those difficulties highlighted in Chapter One for if prejudicial attitudes are responsible in the context of rape victims, is it then to be supposed that something quite different lies behind the almost parallel experiences of non-rape victims? Given the extent and degree of convergence between their trial experiences, this seems a highly improbable proposition. A much more convincing conclusion is that there is a *common* cause behind the negative experiences of both

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<sup>241</sup> McBarnet (1983), p 302.



rape and non-rape victims. This second chapter explores the possibility that this common denominator lies among the structural and functional features of our criminal justice system. Accordingly, section 2.2 examines whether the brutality of cross-examination is attributable to the adversarial nature of our criminal justice system, section 2.3 looks at whether the victim's distinct lack of status within the criminal justice system is responsible for the disappointing conduct of prosecuting counsel and section 2.4 examines whether the adversarial tradition is responsible also for the judiciary's failure to protect victims from the worst excesses of cross-examination.

## 2.2 *Casualties of War*

The adversarial system was dedicated to pitting the testimony, credibility, and reputation of victims and defendants against one another. Witnesses came unknowingly to be assailed in court, and to be seen and heard closely as they were assailed. They confronted a form of trial by ordeal in which their claims to knowledge and veracity were subjected to organised and sustained attack by professional adversaries.<sup>242</sup>

It was shown in Chapter One that defence counsel subject rape victims to gruelling cross-examination ordeals.<sup>243</sup> This was shown to involve ridiculing, vilifying and shaming them by ruthlessly attacking their character and laying their once personal life bare before the court in distorted and contemptuous fashion. Rape victims also find themselves being harassed, intimidated and even blamed for the crime committed against them.

This brutality is typically explained in terms of a misogynist prejudice operating against this specific victim-group. Lees, for example, claims that whilst the image of the law is one of "impartiality, objectivity, rationality and neutrality", this is far from the case in rape trials where stark examples of "male bias" can be found.<sup>244</sup> Chambers and Millar also proffer that the cruelty of the cross-examination process in rape trials derives from the insensitivity of individual defence barristers to the needs and interests of these victims.<sup>245</sup> However, these theories do not explain why victims in

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<sup>242</sup> Rock (1993), p 86.

<sup>243</sup> Section 1.2.1.

<sup>244</sup> Lees (1996), p 130.

<sup>245</sup> Chambers and Millar (1986), p 116.

other trial contexts are subjected to many of the very same abuses.<sup>246</sup> It is suggested that the better explanation of defence counsel's conduct during cross-examination, whether of rape or non-rape complainants, is that it is strategic, taking the form of a series of tried and tested tactics carried out in order to win the case. Further, it is the adversarial concept of criminal justice which dictates that the cross-examination process functions in this way.

### 2.2.1 *Tactics*

The tactical nature of cross-examination is clearly evident from the type of questions asked, together with the manner in which they are asked. Dunstan, for example, argues that cross-examination questions cannot be described as simple requests for information because of the way in which they are produced and treated as "accusations, counter-denials and displays of disbelief".<sup>247</sup> Rather, as revealed in the previous chapter, questions asked during cross-examination often serve purely insidious purposes and may, in fact, be categorised depending on the spurious motivation behind them. For example, sections 1.2.1.1 and 1.2.2.1 above described how victims are routinely vilified during cross-examination in order to discredit their testimony and general standing. This works by prejudicing the jury against the victim so that they find in favour of the defendant. Introducing controversial information about the complainant in this way works also to distract the jury from the main question of what actually happened on the particular occasion.

A standard effect of current cross-examination practices is that victims are severely upset and unsettled. Archbishop Richard Whately admonished the process for this very reason:

[I] think that the kind of skill by which the cross-examiner succeeds in alarming, misleading or bewildering an honest witness may be characterised as the most, or one of the most, base and depraved of all possible employments of intellectual power.<sup>248</sup>

Upsetting victims in this way is not incidental but is, instead, a deliberate ploy affording considerable tactical gains. McEwan explains that, despite the fact that research has found no consistent relationship between the confidence of a witness and his or her accuracy, the fact remains that in the courtroom it is the confident witness

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<sup>246</sup> Chapter One, section 1.2.2.

<sup>247</sup> Dunstan (1980), p 64.



who is more likely to be believed.<sup>249</sup> Similarly, Ellison explains that great importance attaches to the oral performance of witnesses in court; angry, upset or confused witnesses are less able to answer questions effectively, and the confidence with which they describe events is inevitably undermined.<sup>250</sup> Rock, too, observed that “good” witnesses are “clear, audible, measured, succinct, forthright, and honest in manner”.<sup>251</sup> This perceived link between the confidence of a witness and his or her credibility is routinely exploited by counsel, particularly defence counsel for whom the introduction of even a single doubt can ensure victory. This was observed by McEwan who states that the cross-examination of rape complainants is often used simply to humiliate them and therefore to undermine the confidence with which they describe the alleged events.<sup>252</sup> Similarly, in non-rape trials, she explains that cross-examination is “frequently *used* to confuse witnesses, to get them to contradict themselves, showing their unreliability”.<sup>253</sup> Ellison also claims that cross-examination is often “*directed* at unsettling a witness and thereby reducing his or her credibility in the eyes of the jury”.<sup>254</sup>

Ultimately, then, contrary to the imputation made in traditional rape literature, the brutality evident in the cross-examination of rape victims should not be seen as the manifestation of personal animosity towards this victim-group. Rather, regardless of case-type, cross-examination is simply a strategic exercise incorporating a series of formulaic attacks aimed at securing a not-guilty verdict.<sup>255</sup> Because it causes victims such deliberate distress, the cross-examination process raises fundamental questions about the premises on which justice in this jurisdiction is based. Basically, what notion of justice is it that compounds the suffering of those entering the criminal process seeking assistance and vindication? McEwan explains that, in fact, victims

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<sup>248</sup> Whately (1828), p 165.

<sup>249</sup> McEwan (1992), p 17.

<sup>250</sup> Ellison (1998), p 613.

<sup>251</sup> Rock (1993), p 74.

<sup>252</sup> McEwan (1992), p 16.

<sup>253</sup> *Ibid.* (Emphasis added.)

<sup>254</sup> Ellison (1998), p 613. (Emphasis added.)

<sup>255</sup> Of course, much of the tactical gains of cross-examination lie precisely in the fact that it comes across very much as a personal attack. That is, victims, already vulnerable, are more keenly affected by what they perceive as a very personally directed attack and jurors are more likely to be convinced by what counsel is saying if it is framed in such a way as to implicate the particular victim directly. Rock explains that this is the case “however wooden” the delivery of these attacks for they are “disturbing enough to the newcomer, the witness or juror, who kn[o]w nothing of courts, and that [i]s what ma[kes] them effective” (1993, p 83).

may perceive their treatment during cross-examination as a type of *punishment* for having objected to the crime against them.<sup>256</sup> This surely cannot be the object of the criminal justice process. The following section examines the adversarial concept of justice in order to explain why our cross-examination process evidences such scant concern for victims.

### 2.2.2 *Adversariness*

Damaska explains that the adversarial model of criminal justice is not committed to truth-finding, certainly much less so than the inquisitorial systems of Continental Europe.<sup>257</sup> Going further, Thibaut and Walker argue that there is a fundamental dichotomy between truth and justice in adversarial jurisdictions.<sup>258</sup> Damaska attributes the adversarial model's lesser emphasis on truth-discovery to its tendency to prioritise other values.<sup>259</sup> One such value is the protection of the accused from wrongful conviction. The importance of this objective can be seen from the many evidentiary rules in place to minimise the chances of convicting an innocent person.<sup>260</sup> Damaska explains that these rules operate as "barriers" to conviction and that by keeping these barriers high, as mandated by the adversarial tradition, the accuracy of outcomes in the total number of cases is ultimately decreased.<sup>261</sup> That is, the opportunity for guilty defendants to escape conviction is considerably increased. However, this risk to the truth is seen to be offset by the more important, liberal objective of protecting innocent defendants. As Sanders and Young explain, "priority is given to protecting the actually innocent from wrongful conviction over bringing the actually guilty to justice".<sup>262</sup> Another overriding value within the adversarial tradition is the integrity of the criminal justice process. Damaska explains that this is an explicit concern because of the tendency in adversarial systems to mistrust public officials.<sup>263</sup> This mistrust leads to a demand for safeguards against abuse.<sup>264</sup> Accordingly, adversarial systems tolerate evidentiary barriers which impede

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<sup>256</sup> McEwan (1992), p 17.

<sup>257</sup> Damaska (1973), p 580.

<sup>258</sup> Thibaut and Walker (1975), (1978).

<sup>259</sup> Damaska (1973).

<sup>260</sup> Take, for example, the heavy burden of proof which the prosecution must discharge before a conviction can be obtained.

<sup>261</sup> Damaska (1983), p 26.

<sup>262</sup> Sanders and Young (1994), p 3.

<sup>263</sup> Damaska (1973), p 583.

<sup>264</sup> *Ibid.*



truth-discovery rather than risk abuse of official power.<sup>265</sup> In this way, a clearly guilty person can escape conviction if, for example, the evidence against him has been obtained by improper means.

It is clear, then, that because of the primacy of these other values and the evidentiary safeguards in place to promote them, guilt and innocence are not paramount under the adversarial model of criminal justice.<sup>266</sup> However, if the primary objective of our criminal process is not truth-discovery what, then, is its defining function? Damaska tells us that the principal function of the adversarial criminal process is to facilitate the just settlement of conflict between parties in dispute.<sup>267</sup> He explains that a legal process thus aimed at maximising the goal of dispute resolution cannot simultaneously aspire to maximise accurate fact-finding for the truth can “engender hatred and exacerbate a conflict”.<sup>268</sup> Thus, in adversarial systems, truth and justice may actually be in opposition to each other.<sup>269</sup>

In order to implement the goal of conflict resolution most effectively, Damaska explains that the adversarial mode of legal proceeding is “organised around the key image of contest”.<sup>270</sup> Thus, it takes its shape from a contest or a dispute, unfolding as “an engagement of two adversaries before a relatively passive decision-maker whose principal duty is to reach a verdict”.<sup>271</sup> However, it is here suggested that not only

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<sup>265</sup> Preventing abuse of official power was the aim behind section 78 of the Police and Criminal Evidence Act 1984, for example. This Act provided for the first time a detailed legislative framework for the operation of police powers and suspect’s rights. The content of the Act was derived from recommendations made by the 1981 Royal Commission on Criminal Procedure set up to investigate the criminal process in the wake of the so-called “Confait Affair” which had revealed the alarming extent of police misconduct. The Confait episode involved the wrongful conviction and imprisonment of three youths for the murder of Maxwell Confait. The spurious convictions were based on confessions made by the youths and later shown to have been coerced.

<sup>266</sup> Damaska (1973), p 583.

<sup>267</sup> Damaska (1973), (1986).

<sup>268</sup> Damaska (1986), p 123.

<sup>269</sup> At this point, it is worth noting the contrast between the adversarial legal process and the inquisitorial model which pertains in some European jurisdictions. Whilst the principal objective of the adversarial model is conflict-resolution, inquisitorial systems are perceived to be committed primarily to truth-discovery (Damaska (1973), (1986); Thibaut and Walker (1975), (1978)). This is evidenced by the inquisitorial mode of legal proceeding which takes the form of an official and thorough unilateral inquiry, triggered by the initial probability that a crime has been committed (Damaska (1973), p 564). This “inquest morphology” is seen as the best means of producing a correct view of reality.

<sup>270</sup> Damaska (1986), p 88.

Note that the inquisitorial model is “organised around the key image of inquest” (*loc. cit.*).

<sup>271</sup> *Ibid.* at p 3.

does this contest morphology facilitate conflict settlement, but it also accounts for much of the rough treatment which victims experience during cross-examination.

The principal way in which the contest nature of the adversarial model is responsible for the brutality of cross-examination derives from the competitiveness inherent in the proceedings. This can be seen from the nature of the relationship between prosecuting and defending counsel. Damaska explains that these protagonists have definite, independent, and conflicting functions.<sup>272</sup> That is, the prosecutor's role is to obtain a conviction whilst the defence's duty is to block this effort.<sup>273</sup> Rock explains how this functional opposition operates in practice. The whole of the prosecution case, he says, takes the form of a "thesis" at the core of which are "pointed allegations about wrongdoing, immorality, and mendacity whose acceptance would almost certainly lead to public disgrace and punishment".<sup>274</sup> The role of defence counsel is to supply a rival way of explaining the incident in question, what might be called the "antithesis".<sup>275</sup> Rock explains that this antithesis does not have to be as solid or imposing as the thesis advanced by the prosecution but usually takes the form of an "attack" that seeks chiefly to "puncture the impression achieved by the prosecution and prosecution witnesses".<sup>276</sup>

This fundamental opposition between the roles of defending and prosecuting counsel is thought to facilitate conflict resolution because it means that verdicts are reached only after each party has had the opportunity both to present fully his or her own evidence and to test vigorously the evidence of the opposition. Having done so, the parties are ostensibly more inclined to accept the final verdict and, further, the judgment itself is seen as more reliable. Stone praises the adversarial approach for this reason:

Less dynamic procedure could be imagined, where the evidence of witnesses is not challenged directly by adversaries, but is simply compared and assessed by the court... This would be less effective. Mere competition between contradictory assertions is not enough. It is best that parties test each other's cases by head-on confrontation. This occurs when the opposing points of view meet in cross-

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<sup>272</sup> Damaska (1973), p 563.

<sup>273</sup> *Ibid.*

<sup>274</sup> Rock (1993), p 32.

<sup>275</sup> *Ibid.* at p 33.

<sup>276</sup> *Ibid.* at pp 33, 34.



examination. This is the cutting edge of advocacy. In this way, in forming sound judgements, the court is assisted by contentious advocacy, which directly tests evidence for accuracy, and exposes errors, gaps or lies.<sup>277</sup>

However, this “contentious advocacy” leads also to the abuse of victims. Rock describes how defence counsel’s challenge of the prosecution case takes the form of an “attack” on the victim involving argument and questioning designed to reveal inconsistency, error, improper motives, forgetfulness, and falsehood.<sup>278</sup> He reports that the questions asked are often searching, probing minor contradiction after minor contradiction in order to give a different account of even small details, to raise a doubt as to the prosecution case because the jury have been told they have to be sure.<sup>279</sup> These methods and their undesirable implications for victims were outlined in detail in Chapter One above. Ultimately, then, by virtue of defence counsel’s formal function within the adversarial model, victims suffer.

Heightening the conflict inherent in adversarial proceedings is the fact that counsel are required to discharge their role with partisan zeal:

An advocate, in the discharge of his duty, knows but one person in the world, and that person is his client.<sup>280</sup>

In this way, lawyers are encouraged to be very single-minded in representing their client and, again, this may be tied in with verdict acceptance and conflict settlement. Further, because of the accused’s special vulnerability, defence counsel are given particular encouragement to provide a zealous and partisan representation.<sup>281</sup> The *Code of Conduct of the Bar of England and Wales*, for example, states explicitly that defence counsel must “promote and protect fearlessly and by all proper and lawful means his lay client’s best interests”.<sup>282</sup> Therefore, not only are defence counsel officially charged with “puncturing” the prosecution case, but they are formally

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<sup>277</sup> Stone (1995), p 4.

<sup>278</sup> Rock (1993), p 34.

<sup>279</sup> *Ibid.*

<sup>280</sup> Lord Brougham (1821).

<sup>281</sup> This is to be contrasted with the conduct expected of prosecuting counsel for whom, Jackson explains, there exists a special obligation to act in the interests of justice (1997, p 15). In this way, it is not the duty of prosecuting counsel to obtain a conviction by all means at his disposal but, rather, to lay before the court fairly and impartially the whole of the facts which comprise the case for the prosecution. Furthermore, should information come to the knowledge of prosecuting counsel which may assist the defence, he is under an obligation to disclose this. This contrast between the conduct expected of defence and prosecuting counsel is clearly illustrated by Jackson’s games analogy:

There are some things in cricket which the rules would permit to be done, which are not done because this would be taking unfair advantage of an opponent, and that is not cricket. By contrast, defence counsel can adopt the football approach, take all the advantages which the rules and the umpire allow (*loc. cit.* at pp 15, 16).

required to act robustly in this regard. It is suggested that this duty encourages the treatment outlined in Chapter One above for, as Allison and Wrightsman point out, what defence lawyer who has agreed to defend his or her client zealously will not use every means available to ensure a verdict of not-guilty?<sup>283</sup>

Certainly, restrictions are placed on how counsel conduct themselves. Damaska explains that certain procedural rules are in place to ensure that the contest is fought fairly.<sup>284</sup> In addition, the *Code of Conduct of the Bar of England and Wales* proposes to regulate the conduct of cross-examination, making it clear that lawyers have certain legal duties that go beyond pursuing the partisan interest of the side they represent.<sup>285</sup> For example, a practicing barrister must not “make statements or ask questions which are merely scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person”.<sup>286</sup> However, the exposition in Chapter One of the way in which victims are treated during cross-examination revealed that these are precisely the types of questions being asked by defence counsel indicating that the *Code* does little to curtail inappropriate questioning. Significantly, commentators argue that this failure to observe the guidelines precluding abusive cross-examination occurs because any ethical duty to protect complainants and witnesses from unnecessary distress in court necessarily conflicts with the partisan duty owed by defence counsel to his or her client.<sup>287</sup>

The basis upon which verdicts are decided under the contest model further encourages the competitiveness between opposing counsel. This is because, in adversarial jurisdictions, the verdict is not so much a declaration of the truth as it is a preference for one version of the facts over the other.<sup>288</sup> In this way, judgment is awarded in favour of the party who has made the better evidentiary case, the party who has been better able to persuade the court.<sup>289</sup> The favourable verdict is, therefore, attainable to both parties equally, whether or not they have the truth on their side, for essentially what wins the day is effective advocacy. It is clear, then, that truth is not fundamental

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<sup>282</sup> General Council of the Bar of England and Wales (1991), Part VI, para 203 (a).

<sup>283</sup> Allison and Wrightsman (1993), p 178.

<sup>284</sup> Damaska (1986), pp 98-109.

<sup>285</sup> General Council of the Bar of England and Wales (1991).

<sup>286</sup> *Ibid.* at Part VI, para 610(e).

<sup>287</sup> See, for example, Yaroshefsky (1989).

<sup>288</sup> Stone (1995), p 6. See also Rock (1993), p 35.



to the adversarial understanding of a just verdict. Rather, the justness of a verdict is tied to its acceptability to the parties concerned and it is assumed that this acceptance is achieved by having the parties fight, on equal terms, for the verdict. In turn, the overall objective of the adversarial process - conflict resolution - is achieved. In this way, the adversarial verdict may be seen to function as “a peace treaty putting an end to combat”.<sup>290</sup> Whilst this may be so, it is also the case that winning verdicts in this way ensures the brutalisation of victims during cross-examination. Basically, counsel want to win the verdict and because forensic skill is more decisive than truth to the decision-maker, the parties do what they can to ensure their version of events is chosen over and above that of their opponent. This is where the undesirable tactics previously outlined come into play for these “arts of advocacy” are the means by which counsel endeavour to achieve the desired end - the favourable verdict.<sup>291</sup>

The degree of control which legal counsel exert over proceedings under the adversarial model is also greatly responsible for the rough treatment of victims during cross-examination.<sup>292</sup> One aspect of this control is that counsel are responsible for setting the factual and legal parameters of the lawsuit.<sup>293</sup> Basically, the prosecutor chooses what to allege and marshalls evidence in support thereof and the defence, in its turn, chooses what to contest and what to admit and similarly adduces supporting evidence.<sup>294</sup> In this way, the parameters of the dispute are restricted to points of actual disagreement.<sup>295</sup> Damaska explains that party control over the lawsuit is implicit in the adversarial model’s conflict-solving function.<sup>296</sup> That is, it is assumed that parties who are free to run their case largely as they see fit will be more inclined to accept the final verdict, even if unfavourable.<sup>297</sup> If, on the other hand, an

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<sup>289</sup> Damaska (1986), p 122.

<sup>290</sup> *Ibid.* at p 123.

<sup>291</sup> Stone (1995), p 6.

<sup>292</sup> Damaska explains that party control over the lawsuit is widely accepted as a major characteristic of the adversarial system (1986, p 109). This is to be contrasted with inquisitorial proceedings wherein the judiciary are dominant (see section 2.4.1.1 below).

<sup>293</sup> Damaska (1986), pp 111-116.

In inquisitorial systems, on the other hand, an independent actor performs all proof-taking. In fact, this divergence between the two legal models is identified as their major point of difference. Jackson, for example, writes:

Although scholars have argued about the precise characteristics of these modes of trial, the core difference is thought to lie in the degree of participation that is given to the parties in the form of presenting proofs and argument (1997, p 3).

<sup>294</sup> Damaska (1973), p 563.

<sup>295</sup> Damaska (1986), p 111.

<sup>296</sup> *Ibid.*

<sup>297</sup> Jackson and Doran (1995), p 59.

independent party were responsible for adducing the proofs, the loser of the lawsuit would be justified in believing that he could have prevailed if only he had been allowed to handle his own evidentiary case.<sup>298</sup> Should this happen, the pronounced verdict is unlikely to be accepted by both parties and, thus, the object of the adversarial legal process has not been achieved.<sup>299</sup>

However, it is suggested that the degree of control which the parties exert over the lawsuit is responsible also for the difficulties which victims experience during cross-examination. In running their case, counsel are not required to present the tribunal with the truth.<sup>300</sup> Therefore, they have no duty to seek out unfavourable evidence but must, instead, present their case in the manner most advantageous to their client.<sup>301</sup> Consequently, McEwan explains, counsel have become skilled at avoiding contact with evidence which could prejudice their client's interests.<sup>302</sup> In addition, advocates seek to steer the issues, witnesses and other evidence in the direction most favourable to their case.<sup>303</sup> They are also able to limit what is said by these witnesses because of the strict editorial control which they exert over them.<sup>304</sup> Thus, McEwan says, the material available to the tribunal of fact is selected by the advocates who then in court control the narration.<sup>305</sup> The overall result is that lawyers present highly "selective" versions of the case to the court causing potentially important aspects of the incident in question to be missed or deliberately ignored.<sup>306</sup> This has serious negative implications for the truth for, as Damaska explains, "skilful orchestration of proof may obscure rather than clarify what actually happened".<sup>307</sup> Victims are a further casualty of this process for defence counsel are quite free to push cross-examination in the direction most likely to achieve their tactical objectives which, as we have seen, centre generally around causing victims maximum distress and discomfort. McEwan decries the adversarial mode of legal proceeding for this very reason, remonstrating

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<sup>298</sup> Damaska (1986), p 121.

<sup>299</sup> *Ibid.*

<sup>300</sup> McEwan (1992), p 6.

<sup>301</sup> *Ibid.* at p 5.

There are, of course, limits upon this for advocates do have duties towards the court, for example, they must not knowingly mislead it, and, in some cases, they must reveal evidence in their possession even if unfavourable to the client (*loc. cit.*).

<sup>302</sup> *Ibid.* at pp 5, 6.

<sup>303</sup> *Ibid.* at p 13.

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*



that “the degree to which the defence can control which issues should figure in the trial and therefore ensure exposing the alleged victim to a humiliating ordeal” is one of its “least appealing features”.<sup>308</sup>

### *Summary*

The brutality evident in the cross-examination of rape complainants is typically explained in terms of a pronounced prejudice operating against them. This explanation does not, however, take into account the fact that victims in other trial contexts suffer the very same abuses. The previous discussion, on the other hand, provided an explanation which accounts equally for the experience of rape and non-rape victims. This is that much of the degradation which victims undergo during cross-examination is an inevitable consequence of the structure and function of the adversarial criminal trial.

Basically, the adversarial criminal process is organised around conflict - it is activated by human conflict and it functions specifically to resolve this conflict. Moreover, the adversarial model operates upon the ironic premise that this objective is best achieved using procedures which exploit existing conflict. Rock observed in this regard that trials were “devised to revive and sustain an old anger, fuelling it quite deliberately for purposes of interrogation and judgement”.<sup>309</sup> Further, the adversarial process actually generates new conflict, a type of organised and controlled conflict between professional adversaries, whereby competitiveness and opposition are encouraged as the best way in which to facilitate settlement of the original conflict.

Following from this, the courtroom is a place where hostility and antagonism are commonplace.<sup>310</sup> Based on his observations at Wood Green Crown Court, Rock described trials as “struggles”, “trials of strength” and even “fights”.<sup>311</sup> He explains that the words “fight”, “side” and “opponent” are also commonly used by professionals of the court.<sup>312</sup> Jerome Frank, a judge of the US Federal Court of Appeals, similarly observed that the adversarial legal system subscribes to a “fight

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<sup>307</sup> Damaska (1986), p 122.

<sup>308</sup> McEwan (1992), p 110.

<sup>309</sup> Rock (1993), p 85.

<sup>310</sup> *Ibid.* at p 30.

<sup>311</sup> *Ibid.* at pp 31, 38.

theory” of justice.<sup>313</sup> Cross-examination in its current practical form fits well within this hostile environment. Perhaps at no other point in the criminal process is the conflict inherent in adversarial proceedings so clearly in evidence, the hostile opposition so tangible. Matoesian, in fact, describes cross-examination as a “war of words, sequences, and ideas”.<sup>314</sup> Indeed, advocates commonly speak of “breaking” and “destroying” witnesses during cross-examination.<sup>315</sup> Advocacy manuals actually advise that such treatment is a necessary part of good advocacy. Evans, for example, uses the term “butchering a witness”.<sup>316</sup> Similarly, Sherr advises that quite often “the most devastating cross-examination can be a fairly short build up rather like in boxing with one blow to the body followed by a quick blow to the chin”.<sup>317</sup>

Essentially, cross-examination is the most effective weapon in the armoury of the warring factions, its value lying in the gains to be had from employing such tactics as those outlined throughout the course of Chapter One above. As Matoesian explains, the “capability to finesse reality through talk represents the ultimate weapon of domination” in the conflict that is the adversarial criminal trial.<sup>318</sup> It is clearly wrong, therefore, to attribute the abuses which rape victims undergo during cross-examination simply to specific social prejudices against them. Rather, much of this treatment is best explained in terms of the inherently combative nature of the adversarial cross-examination process.<sup>319</sup> In this way, *all* victims are casualties of the adversarial criminal process.

### 2.3 *Orphans of Social Policy*

The victim is so totally out of the case... We leave him outside, angry, maybe humiliated through a cross-examination in court... He has a need for understanding, but is instead a non-person in a Kafka play.<sup>320</sup>

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<sup>312</sup> *Ibid.* at 31.

<sup>313</sup> Frank (1949).

<sup>314</sup> Matoesian (1993), p 1. (Emphasis added.)

<sup>315</sup> Ellison (1998), p 614.

<sup>316</sup> Evans (1993), p 97.

<sup>317</sup> Sherr (1993), p 99.

<sup>318</sup> Matoesian (1993), p 1.

<sup>319</sup> Ellison (1998), p 614.

<sup>320</sup> Christie (1977), p 8.



Chapter One revealed that prosecutors come under considerable fire for the way in which they discharge their prosecutorial function in rape trials.<sup>321</sup> A significant grievance is the almost complete lack of contact with the rape victim. This causes her to arrive at court totally unprepared for the rigours of the trial process so that her anxiety is heightened and her performance in the witness-box impaired. Another consequence is that she feels very alone and vulnerable throughout her court experience. It is also complained that prosecutors are disinterested and detached from the rape victim and her grievance with the result that they present her case only very half-heartedly and make no effective challenge of the defence case. Other criticisms include the prosecutor's failure to protect rape victims from defence counsel's onslaught during cross-examination. Indeed, prosecutors are themselves accused of maltreating rape victims by, for example, participating in blaming them for the attack.

Typically, traditional rape literature implies that these difficulties are unique to rape cases and following from this that they are the product of a negative mindset towards this specific victim-group. Lees, for example, argues that if prosecutors "took seriously the idea of the woman's experience of rape", they would provide a more effective representation.<sup>322</sup> However, this theory does not explain why victims in other trial contexts are similarly dissatisfied with the way in which prosecutors handle their grievance.<sup>323</sup> It is suggested that the better explanation of the prosecutor's treatment of victims, whether in rape or non-rape cases, is that it is derivative of the status which victims as a whole have within the criminal justice system. Moreover, this factor shapes the treatment of victims in many ways throughout the criminal process.

### 2.3.1 *Status*

The status of victims within our legal system has undergone a steady but radical evolution. Henderson tells us that in Europe and England after the collapse of the Roman Empire, the victim and the criminal process were intimately linked.<sup>324</sup> This was because no formal government structure existed and so criminal justice depended

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<sup>321</sup> Section 1.3.1.

<sup>322</sup> Lees (1989b), p 14.

<sup>323</sup> Chapter One, section 1.3.2.

<sup>324</sup> Henderson (1984-85), p 938.

largely on self-help or the help of kin.<sup>325</sup> On this basis, the victim or his or her kin exacted vengeance against and repayment from the perpetrator or his kin.<sup>326</sup> It is clear, then, that at this point in English legal history the criminal process centred around the victim.

However, as English society became more organised and feudal lords began to assert dominion over others, the law of the blood feud became more refined and subordinated to public interests.<sup>327</sup> Monetary compensation for victims and fines payable to the king began to take over as the primary vehicle for enforcing criminal law.<sup>328</sup> However, whilst this system of compensation appears to remain solicitous of the victim's right to restoration from the wrongdoer, Henderson explains that, in practice, victims seldom received any compensation.<sup>329</sup> Therefore, the traditional primacy of the victim had most definitely started to erode by this stage. Further societal development meant that kings gained and solidified authority and the concept of "the king's peace" prevailed so that criminal acts came to be seen as offences against the Crown rather than against the individual.<sup>330</sup> By the thirteenth century, Henderson explains, the criminal law had come to serve the feudal system and the lords far more than it did victims thus transforming it from a mixture of public and private law, to law of an exclusively public nature.<sup>331</sup> Ostensibly, therefore, the criminal process was no longer to be used by individuals as a facility by which to settle private scores but was, instead, to operate for the good of society as a whole.

Contemporary English criminal justice sees the evolution of the victim complete. In the transition from private to public criminal justice, the State has assumed the role of the victim and in this way has completely displaced him in the criminal process. Christie speaks of this development in terms of case "ownership" - the original conflict between victim and offender has been taken away, stolen, from them by the professionals of the criminal justice system, the police and lawyers.<sup>332</sup> The result of this reallocation of case ownership is that victims have been completely divested of

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<sup>325</sup> *Ibid.* at pp 938, 939.

<sup>326</sup> *Ibid.* at p 939.

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.* at p 940.

<sup>331</sup> *Ibid.*



any formal role or status within the criminal justice system. Christie explains that the victim is acknowledged merely as “triggerer-off” of the criminal process.<sup>333</sup> Rock tells us that the victim functions only as a witness - having suffered, he or she must “attest to the injuries to person and property that [have been] translated metaphysically into an attack on the community as a whole”.<sup>334</sup> Ultimately, Shapland explains, victims are “non-persons” in the eyes of criminal justice professionals.<sup>335</sup>

The victim’s complete lack of status dramatically shapes his experience within the criminal justice system. Christie explains that the overriding implication is that the victim has lost all participation in his own case.<sup>336</sup> In fact, he says, victims are pushed completely out of the arena for most of the proceedings.<sup>337</sup> The following sections discuss three major consequences of the victim’s exclusion from the criminal process. These are their lack of input into the prosecutorial decision-making process, the failure to provide them with informational support and the negative treatment of them and their grievance by prosecuting counsel.

#### *2.3.1.1 Prosecutorial Decision-Making*

An immediate indication that victims are excluded from the handling of their own grievance is the fact that they have been consigned no official, documented role in the prosecutorial decision-making process. Rather, the Crown Prosecution Service (CPS) makes the decision whether or not a particular crime will be prosecuted.<sup>338</sup> The only deference to the actual aggrieved party in this regard is contained in the Code for Crown Prosecutors which states that the CPS must take into account the interests of the victim when considering whether or not prosecution in any particular case is in the “public interest”.<sup>339</sup> However, the practical value of this concession is nominal for,

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<sup>332</sup> Christie (1977).

<sup>333</sup> *Ibid.* at p 3.

<sup>334</sup> Rock (1993), p 159.

<sup>335</sup> Shapland (1993), p 18.

<sup>336</sup> Christie (1977), p 7.

<sup>337</sup> *Ibid.* at p 3.

<sup>338</sup> Certainly, it is possible for the victim to institute, as an individual, private criminal proceedings. Indeed, supporters of private prosecution see it as “a necessary safeguard against inaction on the part of the authorities” (Justice (1973), para 89). However, the practical value of this right is negligible for exorbitant costs coupled with unpredictable outcomes prove considerable disincentives to the average person. The instigation of criminal proceedings is, therefore, necessarily done almost wholly by the Crown.

<sup>339</sup> The Code for Crown Prosecutors is published as a public document setting out the general guiding principles on which CPS decisions about prosecutions are made; the current revised version came into

Ashworth explains, “the general approach is that, whilst account should be taken of any views expressed by the victim, the general public interest must continue to prevail”.<sup>340</sup>

It is clear, then, that despite the victim’s obvious stake in the outcome, the prosecutorial decision-making process defers to the interests of the public over and above those of the victim. This state of affairs derives from the fact that the criminal sanction operates to serve society as a whole and not specific individuals. Further, assigning the prosecutorial decision-making process to officials is seen to enable a consistency of prosecution policy which would be impossible if the task were left to victims. Ashworth explains that if prosecutorial decision-making were placed in the hands of victims, the disposal of a defendant’s case would depend on whether a particular victim was vengeful or forgiving.<sup>341</sup> Officials, on the other hand, exercise their coercive power to punish uniformly, dealing comparably with those whose offences are similar in terms of harm and culpability.<sup>342</sup> Consequently, arbitrary decision-making is reduced and legitimate expectations of the criminal process, on the part both of defendants and society as a whole, are enabled.

From the point of view of victims, however, the Crown’s monopolisation of prosecutorial decision-making clearly denies them the right to participate in something of immediate importance to them. Moreover, it raises the question whether decision-making in this regard, either to prosecute or not to prosecute, respects the legitimate expectations of victims. That is, are there occasions when prosecutorial discretion is exercised in clear conflict with victim wishes?

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effect in 1994. Basically, the Code sets out two tests, both of which must be satisfied if a particular crime is to be prosecuted. The first of these is whether or not, on the evidence, there is a “realistic prospect of conviction”. This test reflects the perception that it is wrong for a person to undergo prosecution where the evidence is insufficient. Ashworth explains why:

The essence of the wrongness lies in the protection of the innocent: if this principle is taken seriously, it should mean not merely that innocent people are not convicted, but also that innocent people should not be prosecuted. The reason for this may be found in the dictum that “the process is the punishment”.... There are therefore sound reasons for not prosecuting someone against whom the evidence is insufficient. There are also good economic reasons: it is a waste of police time in compiling a full file on the case, of prosecution time in reviewing the case, and of court time in dealing with the case (1994, p 161).

The second test is whether or not prosecution in the particular case is in the “public interest”.

<sup>340</sup> Ashworth (1994), p 184. (Emphasis added.)

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.* at p 185.



With regard to decisions taken to prosecute, Shapland *et al* found that seventeen per cent of the victims in their study showed, at some stage of the case, unwillingness to help prosecute the offender or to press charges.<sup>343</sup> Despite this, the majority of these victims ended up at court, the police having finally persuaded them or having gone ahead regardless of the victim's wishes.<sup>344</sup> Shapland *et al* report that the victims who were ignored in this way were caused great distress and all of them felt that it should have been them who had the final word on prosecution, not the police.<sup>345</sup> Shapland *et al* remark that whilst it is perhaps desirable that the police have the final say on prosecution from the point of view that offenders who intimidate victims will still get prosecuted, it does express the central dilemma of a criminal justice system with a centralised power of prosecution - that of the ownership of the case.<sup>346</sup> That is, whilst victims think in terms of a case belonging to them, the reality is that it belongs to officials who may dispose of it as they see fit, regardless of the victim's wishes.

This ownership dilemma is expressed also in the context of decisions made *not* to prosecute. In fact, this is a much more problematic area because these decisions lack visibility and, as such, make it very difficult to determine the legitimacy of the reasoning involved. The major question is whether victims, particularly of serious crimes, can reasonably expect to have their grievance prosecuted. The following highly publicised incident suggests that victims cannot make any assumptions in this regard. In December 1994, Shiji Lapite, a Nigerian-born man, was stopped by two plainclothes officers, PCs Paul Wright and Andrew McCallum, for "acting suspiciously". These officers took Mr. Lapite into custody and thirty minutes later he was dead. Post mortems found that death was due to asphyxia caused by a neck-hold which had fractured bones in Mr. Lapite's larynx. An inquest jury brought in a verdict of unlawful killing. Despite this, the Director of Public Prosecutions (DPP), Dame Barbara Mills, decided not to prosecute the officers. It was only in July 1997, as the High Court was about to hear a challenge brought by the deceased's widow, that the DPP revealed her intention to review her initial decision.<sup>347</sup>

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<sup>343</sup> Shapland, Willmore and Duff (1985), p 46.

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.*

<sup>347</sup> *The Guardian* (24/07/97), p 2.

The DPP's conduct in this case indicates that victims really have no *locus standi* in the prosecutorial decision-making process, however serious the crime committed against them. Certainly, the success of Mr. Lapite's widow in challenging the initial CPS decision indicates that there does exist some facility (judicial review) by which individuals may contest official decision-making and to good effect. However, it is suggested that but for the damning publicity provoked by the racial controversy of the case, the DPP decision not to prosecute Mr. Lapite's unlawful killing might well have stood. This may be implied from the fact that deaths in police custody seem regularly to go unprosecuted. Deborah Coles, co-director of *Inquest*, an organisation which has waged a long campaign over deaths in custody, claimed that the Lapite case simply confirmed the general "unwillingness" to charge police officers whose conduct has led to death or serious injury.<sup>348</sup>

If prosecution is not guaranteed even in cases involving unlawful killing, it is highly unlikely that victims of less serious crime exert any influence over prosecutorial decision-making. This, it seems, is particularly true where the victim is of low social status. Elias claims that, in fact, officials have "incentives to ignore entire victim categories" and, among those routinely "de-emphasised", are "less influential" victims such as women, minorities, and the poor.<sup>349</sup> Conversely, research shows that officials are willing to defer to the wishes of 'important' victims. McConville *et al*, for example, suggest that the CPS have been willing to persevere with some prosecutions that ought to have been dropped on public interest grounds, simply in order to placate certain victims such as local businesses.<sup>350</sup>

Ultimately, because of their lack of status within the criminal justice system, victims are denied any meaningful participation in the prosecutorial decision-making process

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<sup>348</sup> *Ibid.*

<sup>349</sup> Elias (1986), p 141.

<sup>350</sup> McConville, Sanders and Leng (1991), p 114.

Sanders and Young claim that police authority is similarly exercised in favour of powerful victims, rather than those of low status (1994, p 94). This is clearly evidenced by their handling of domestic violence cases where the "explain the position and do nothing" strategy is quite often adopted, even where the situation is potentially dangerous (*ibid.*). Kemp and Fielding explain that in such cases, the victim's views are basically ignored and the offence and offender become police property to be disposed of in a manner which most suits police rather than victim priorities (1992, p 73). Sanders and Young explain that the police adopt this attitude in domestic violence cases because this particular victim-group is in a weak position thus offering little incentive to arrest (1994, p 94). This, it seems, is



and, as shown, this would seem to be the case however serious the particular victimisation. Following from this, victims may well find that decision-making in this regard goes against their express wishes and when this happens, there is very little that they can do about it for their lack of legal status denies them any real political leverage in the criminal process.<sup>351</sup> Further, this political leverage is reduced depending on the race, gender, and class of individual victims and, in this way, the criminal process can be seen to reflect “the same configuration of interests and power as in the broader society”.<sup>352</sup>

### 2.3.1.2 Information

A further significant consequence of the victim’s lack of formal status within the criminal justice system is the distinct failure to provide him with information concerning even the most critical aspects of the processing of his grievance. In fact, this is a source of bitter disappointment for victims whose need for informational support has been found to be even greater than their need for emotional support.<sup>353</sup>

### *Pre-Trial*

To begin with, there is no cohesive policy in support of ensuring that victims are notified of CPS decision-making. This is the necessary implication from research which shows that after making their statement to the police on the day of the offence, the majority of victims are provided with no further information until they receive their summons.<sup>354</sup> Victims report, therefore, being “left in the dark” during this period, usually a considerable length of time.<sup>355</sup> Clearly, then, victims are often not aware that their case is being prosecuted until they receive a summons to court.

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perfectly legal because there are no laws establishing *locus standi* for victims or formalising the criteria which should or should not be used by the police in exercising their discretion (*ibid.*).

<sup>351</sup> Elias (1986), p 160.

<sup>352</sup> *Ibid.*

<sup>353</sup> See, for example, Brown and Yantzi (1980); Kelly (1982); Shapland, Willmore and Duff (1985); Temkin (1987).

<sup>354</sup> See, for example, Jackson, Kilpatrick and Harvey (1991), p 52.

In fact, in Jackson *et al*’s study, only those victims who had gone to the police station for a specific reason, for example, to identify articles or for the purposes of an identification parade, gleaned any information from the police following the initial contact (*loc. cit.* at pp 52, 53).

<sup>355</sup> *Ibid.* at p 52.

The summons to attend court is usually issued close to the date of required attendance which is generally a considerable time after the offence has been reported. Jackson, Kilpatrick and Harvey, for example, found that cases reached the magistrates’ court within nine months of the offence, but only one-third of Crown Court cases came to trial in this time, and almost another third did not come to trial until fifteen months or more after the offence (*loc. cit.*).

Alternatively, those whose case the CPS has decided not to proceed with may receive no notification of this at all.

Unsurprisingly, there is then no general policy in support of explaining to victims the reasons behind CPS decision-making. That is, it is only in homicide cases that the CPS is required to meet with the victim's family in order to explain their decision on prosecution, particularly in cases where it has been decided to reduce the charge to manslaughter and where it is decided not to proceed at all.<sup>356</sup> In non-homicide cases, on the other hand, information about prosecutorial decision-making is ostensibly provided by the police. Therefore, if the CPS decides to accept a plea of guilty to a lesser charge or that the evidence does not justify proceeding at all, a police officer will be charged with trying to explain this to the victim.<sup>357</sup> However, in his extensive review of the CPS, Sir Iain Glidewell noted that whether the police perform this function adequately must sometimes be in doubt.<sup>358</sup>

Another indication of the startling lack of communication with victims is the fact that they may find themselves attending court needlessly because nobody has informed them that their case has been adjourned. Jackson *et al*, for example, found that cases are frequently adjourned but while in many cases the police are able to inform victims of these adjournments before they attend court, in some cases, this does not happen.<sup>359</sup> They detail one case where the victim had taken the morning off work to attend the Crown Court where he waited for three hours during which time no one approached him or allowed him to see his statement. It was only upon his own inquiry that he discovered that his case had been adjourned.<sup>360</sup> Similarly, a study conducted by Victim Support revealed that in thirty-seven per cent of cases where victims were required to attend court, the hearing did not take place on the appointed day. Of those affected, a startling seventy per cent were unaware of the change until they arrived at court.<sup>361</sup> In view of this, it is not surprising that Glidewell found prosecution

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<sup>356</sup> Glidewell (1998), para 83, p 113.

<sup>357</sup> *Ibid.* at para 84, p 113.

<sup>358</sup> *Ibid.*

<sup>359</sup> Jackson, Kilpatrick and Harvey (1991), p 66.

<sup>360</sup> *Ibid.* at pp 83, 84.

<sup>361</sup> Victim Support (1991), p 7.



witnesses to be increasingly reluctant to attend court, being unwilling to “waste their time further”.<sup>362</sup>

### *At Court*

From their research into the experience of victims at court, Shapland and Bell concluded that in terms of informational support, many Crown Court centres cannot be considered as “victim-aware”.<sup>363</sup> A primary indicator of this is that information to help victims find out where their case is being heard is really quite inadequate. Shapland and Bell, for example, report that whilst they expected witness information points to be “universal” in Crown Courts, in fact, only 76 per cent had one by 1996.<sup>364</sup> In the Northern Ireland context, Jackson *et al* report that victims have difficulty in identifying anyone to assist them in finding their bearings.<sup>365</sup> They explain that the duty solicitor facility does not necessarily ease this situation for he is frequently in court so that this information point is often left unattended.<sup>366</sup> The only other information system in existence, they report, are two notice-boards in the magistrates’ court and one in the Crown Court. However, whilst lists of cases and courtrooms are posted on these notice-boards, there is no indication of this so that victims do not know to look there.<sup>367</sup> Further, cases are listed on these notice-boards in numerical order by the defendant’s name. The problem with this is that victims often do not know the defendant’s name so that they are unable to identify their case.<sup>368</sup> Ultimately, as one duty solicitor commented, “if you are a victim or a witness, or a first time offender, you are thrust into a frightening situation with no point of reference”.<sup>369</sup>

Another major complaint is that if there is a guilty plea at the last minute, no one tells the victim so that they may remain sitting in the waiting area unawares.<sup>370</sup> Shapland and Bell found that only sixty-eight per cent of magistrates’ courts and sixty-seven per cent of Crown Courts were clear that victims would be told of these last minute

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<sup>362</sup> Glidewell (1998), para 89, p 114.

<sup>363</sup> Shapland and Bell (1998), p 541.

<sup>364</sup> *Ibid.* at p 540.

<sup>365</sup> Jackson, Kilpatrick and Harvey (1991), p 78.

<sup>366</sup> *Ibid.* at p 77.

<sup>367</sup> *Ibid.*

<sup>368</sup> Shapland and Bell observed this problem also in their English study and explain that victims are often not told the name of the defendant in order to prevent any possible intimidation (1998, p 539).

<sup>369</sup> Jackson, Kilpatrick and Harvey (1991), p 78.

developments.<sup>371</sup> Therefore, as many as one-third of courts have no established practice of keeping victims informed of when their case is about to start or if it is to start at all.<sup>372</sup> Similarly, in their Northern Ireland study, Jackson *et al* found that in both the magistrates' court and the Crown Court, victims did not always find out about a change of plea until some time after the case had been dealt with so that they would themselves waiting to give evidence when they were no longer needed.<sup>373</sup>

### *Post-Trial*

Another example of the failure to communicate sufficiently with victims is the fact that the majority of them receive little or no information about compensation. Ashworth explains that although victims of violent crime have access to the Criminal Injuries Compensation Board for compensation (within the regulations), an early study showed that only thirty-nine per cent of victims of violence got to know about the Board's existence.<sup>374</sup> Further, efforts to improve the situation by imposing a duty on the police to inform victims have not met with complete success, largely because of incomplete understanding by police officers of the scheme and its relationship to court compensation.<sup>375</sup>

It can be seen, then, that victims are not being kept properly informed throughout the processing of their case. This is a direct consequence of their lack of status within the criminal justice system. Shapland *et al* observed this with regard to police attitudes and behaviour towards victims. They noted that these tend to convey the common denominator that victims are not necessarily valued as an important part of the criminal justice system.<sup>376</sup> Consequently, the police do not see it as their role to offer either emotional or informational support to victims.<sup>377</sup> This state of affairs reflects again the case ownership dilemma. That is, victims think in terms of the case belonging to them and, following from this, assume that they are entitled to all information pertinent to the case. In reality, however, the Crown has divested the

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<sup>370</sup> Shapland and Bell (1998), p 540.

<sup>371</sup> *Ibid.*

<sup>372</sup> *Ibid.*

<sup>373</sup> Jackson, Kilpatrick and Harvey (1991), p 83.

<sup>374</sup> Ashworth (1994), p 46.

<sup>375</sup> *Ibid.*

<sup>376</sup> Shapland, Willmore and Duff (1985), p 30.

<sup>377</sup> *Ibid.*



victim of title to the case and, consequently, of any attendant ownership rights, including the right to information.

Certainly, progress has been made in this regard beginning with the *Victim's Charter* mandate that victims be kept informed of significant developments in their case.<sup>378</sup> Following from this, research has been undertaken and pilot schemes have been run to ascertain the best way to keep victims informed.<sup>379</sup> However, as with the wider history of services for victims, major official statements and grand gestures are followed at a much slower pace by actual practical facilities on the ground so that, as shown, there is currently no cohesive provision of informational support for victims.<sup>380</sup> A major reason for this is that the provision of services for victims is largely dependent on the availability of resources. With specific regard to informational services, Glidewell stated:

Regarding informing witnesses and victims, the role of the CPS will no doubt become more prominent but will, as always, depend upon the resources available to it.<sup>381</sup>

Ironically, the subordination of victim care to the availability of resources underscores the lack of value attached to victims and their interests. That is, if victims were properly valued, improving their experience within the criminal justice system would be considered such an imperative that adequate funding would be made available as a priority.

### 2.3.1.3 Legal Representation

A third major indication that victims have no formal role or status within the criminal justice system is the fact that they are not legally represented - the prosecutor represents the public, not the victim. Once again, this derives from the victim's displacement by the State - because a crime is considered to be a wrong against the

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<sup>378</sup> Home Office (1991) and (1996).

<sup>379</sup> A major research initiative has been Sir Iain Glidewell's review of the CPS (Glidewell, 1998). This commission examined, *inter alia*, how the CPS can be more pro-active in contacting victims direct in order to keep them informed of developments and decisions on prosecutions whilst taking into account their needs. The pilot scheme which has been running is the so-called 'One Stop Shop' which aims to provide a single police point to gather and pass on information to victims (Home Office (1998), para 6.22, p 43). If a particular victim opts into this scheme, the police will ostensibly ensure that they are kept informed of all significant developments in the progress of their case. In addition, information provided by other agencies will also be passed on.

<sup>380</sup> Shapland and Bell (1998), p 538.

<sup>381</sup> Glidewell (1998), para 91, p 115.

State or the public, it is prosecuted on their behalf by the Crown.<sup>382</sup> Therefore, despite being the actual aggrieved party, the victim is considered to have no legal interest in the criminal process.<sup>383</sup> Consequently, he or she is not legally represented for this is reserved for the official parties to the case, the State and the defendant, whose legal interests are at stake.

The fact that the prosecutor is not the victim's personal representative can be used to explain how he treats them and their grievance.<sup>384</sup> First of all, it accounts for why victims so often feel that he neglects their interests. Take, for example, the plea-negotiation process which comes in for considerable criticism in this regard. Victims blame the prosecutor for failing to take their concerns into account when deciding whether or not to settle cases by way of plea-negotiation and when deciding the terms of such settlements. For example, victims feel dismayed at the lesser sentences handed out in plea-negotiated cases, remonstrating that these do not reflect the full extent of their victimisation. Victims also complain that plea-negotiation denies them the opportunity to give evidence and thereby to tell their story.

However, the fact is that the prosecutor has no obligation to defer to the victim, either during plea-negotiation or at any other stage of the criminal process, for his duty is first and foremost to the public. As such, victim interests are always secondary to those of the public, if considered at all.<sup>385</sup> In the specific context of plea-negotiation, for example, the victim's needs are routinely subordinated to the desire to save public resources by avoiding a full-blown trial.<sup>386</sup> Certainly, victim interests may complement those of the public and, when this happens, their needs will be met. However, in this situation, victims are viewed "functionally, as possible ingredients to help pursue cases, or to promote public relations, but not as people whose interests constitute ends in themselves".<sup>387</sup>

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<sup>382</sup> *Ibid.* at para 79, p 112.

<sup>383</sup> *Ibid.*

<sup>384</sup> The various criticisms directed at prosecuting counsel for his conduct in both rape and non-rape cases are outlined in sections 1.3.1 and 1.3.2 respectively of Chapter One above.

<sup>385</sup> Elias (1986), p 140.

<sup>386</sup> Shapland, Willmore and Duff (1985), p 54.

<sup>387</sup> Elias (1986), pp 140, 141.



The fact that the prosecutor's client is the State, not the victim, can be used to explain other aspects of victim dissatisfaction. For example, the failure to prevent the abuses of cross-examination can be attributed partially to the distinct lack of affiliation between prosecutor and victim. Basically, prosecutors are unlikely to be as motivated to protect victims as they might be if a lawyer-client relationship existed between them. As it is, such is the lack of connection between them that, often, the prosecutor does not even know who the victim is on the very day of the trial.<sup>388</sup> Moreover, prosecutors themselves treat victims unkindly by, for example, bringing them insympathetically and curtly through their evidence-in-chief. This, too, can be explained in terms of the victim's lack of special status within the criminal justice system. Because the victim is merely a witness for the Crown, prosecuting counsel perceive and treat him as no more than a resource, and a problematic one at that. It is in managing this resource that prosecuting counsel cause victims frustration and degradation.<sup>389</sup> McBarnet explains that failing to limit the victim's testimony to the minimum evidence required for conviction carries with it potential disaster for the Crown case.<sup>390</sup> The hazards involved in allowing the victim free rein thus lead to the employment of preventive techniques to manipulate the information presented.<sup>391</sup> However, these techniques constitute abrupt and suspicious treatment of the victim as they are interrupted, cut off and even scolded whilst giving their evidence.<sup>392</sup>

### *Summary*

The implication in traditional rape literature is that prosecuting counsel treat rape victims badly because they have no regard for this particular victim-group. However, this does not explain why victims in other trial contexts are often similarly dissatisfied with how prosecutors treat them and their grievance. The previous analysis, on the other hand, accounts for the experience of both rape and non-rape victims in this regard. It also explains two other major sources of victim dissatisfaction - why they

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<sup>38</sup> Chapter One, section 1.3.

<sup>39</sup> McBarnet (1983), p 299.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

are denied any say in the prosecutorial decision-making process and why information about the processing of their complaint is not provided as a priority.<sup>393</sup>

These matters were explained in terms of the victim's lack of official status within the criminal justice system as a consequence of having been displaced by the State - the State is not just the arbiter in a trial between victim and offender; the State is the victim.<sup>394</sup> By thus assuming the role of the victim, the State has divested the actual aggrieved party of his legal interest in the case, reducing his standing to that of mere witness for the Crown. Having lost ownership of his case, the victim is consequently deprived of all attendant rights and privileges, for these are reserved for the official parties to the case - the State and the defendant. Hence, the victim is not entitled to any generalised informational support, to participate in decision-making, or to personal legal representation. In fact, such is the lack of provision for victims within the criminal justice system that Mayhew describes them as the "stepchildren", not to say the "orphans" of social policy.<sup>395</sup> Ultimately, McBarnet explains, if victims feel that nobody cares about their suffering, it is in part because *institutionally* nobody does - the trial is an "institution of proof not comfort, on behalf not of the victim but of the state".<sup>396</sup>

## 2.4 *Passive Umpires*

Judges, it is said, should exhibit both authority and restraint, remain aloof yet ever attentive, act as umpire rather than player...<sup>397</sup>

It was shown in Chapter One that rape victims undergo a considerable ordeal during cross-examination.<sup>398</sup> It was also shown that this has given rise to the criticism that trial judges are failing this victim-group by not intervening to prevent their abuse in

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<sup>393</sup> In addition, it is suggested that the victim's lack of status is relevant also to the issue of why cross-examination is such an ordeal for them on the basis that if victims were valued, such treatment would not be tolerated.

<sup>394</sup> McBarnet (1983), p 300.

<sup>395</sup> Mayhew (1984), p 67.

Very recently, however, greater deference is being shown towards victims. This shift in attitude is referred to in greater detail in Chapter Five below.

<sup>396</sup> McBarnet (1983), p 300.

<sup>397</sup> Jackson (1997), p 18.

<sup>398</sup> Section 1.2.1.



the witness-box.<sup>399</sup> The assumption inherent in most rape literature is that judges take this non-interventionist stance in rape cases only and, further, that they do this because of a deep-seated prejudice towards this victim-group. However, this explanation does not account for the fact that judicial non-intervention seems to be a problem in non-rape cases also.<sup>400</sup> It is here suggested that the better explanation of why judges grant defence counsel such wide latitude for abusing victims, in both rape and non-rape cases, is that it is derivative of the judiciary's formal role within the adversarial criminal trial.

#### 2.4.1 *Neutral Arbiters*

As explained, the adversarial criminal trial is structured as a contest between two parties in conflict with each other, the prosecution representing the public interest and the defence representing the interests of the defendant.<sup>401</sup> Within this contest structure, the parties monopolise the proceedings - it is they who control the proof process, setting the factual and legal parameters of the dispute and gathering and testing all available evidence.<sup>402</sup> The judiciary necessarily occupy a much weaker position within the adversarial trial context - there is simply no room for another highly active, interested party. What is needed, however, is an adjudicating body - someone to supervise the proceedings, arbitrate between the contestants, and facilitate the final judgement.<sup>403</sup> Thus, the role of the adversarial trial judge is limited to umpiring the proceedings.

The adversarial judge's role as umpire to the proceedings naturally places significant restrictions on the level of activity in which he is permitted to indulge. However, adversarial jurisdictions evince also a cultural unwillingness, stemming from their historical mistrust of officials, to allow the judiciary a more active role within the criminal process.<sup>404</sup> It is feared that if judges were more active, then their neutrality

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<sup>399</sup> Section 1.4.1.

<sup>400</sup> Section 1.4.2.

<sup>401</sup> Section 2.2.2 above.

<sup>402</sup> *Ibid.*

<sup>403</sup> In the context of a jury trial, this involves assisting the jury with points of law so that they may reach a verdict. Where there is no jury in attendance, as in Northern Ireland's so-called 'Diplock Courts', the judge himself will decide the verdict.

<sup>404</sup> Section 2.2.2 above.

could not be guaranteed and, thus, the “cornerstone” of the adversarial model would be eroded, leaving little else to be said for it.<sup>405</sup>

Take, for example, the proof process. Jackson and Doran explain in this regard that it is very difficult for active investigators to suspend judgement and weigh evidence dispassionately.<sup>406</sup> Consequently, the situation could arise that a judge who had participated in the pre-trial preparation of a case arrived at court with his mind already made up. This would undermine the objective of the adversarial mode of legal proceeding which requires each side of the controversy to be carefully considered and given its full weight and value before a decision is reached.<sup>407</sup> In fact, the primary value of adversarial advocacy is that it enables fact-finders to suspend judgement in this way. Fuller refers to the American Bar Association which claims that, in the absence of an adversary presentation, there is a strong tendency by any deciding official to reach a conclusion at an early stage and to adhere to that conclusion in the face of conflicting considerations later developed.<sup>408</sup> Adversarial advocacy is seen to prevent this “natural human tendency to judge too swiftly” because the arguments of counsel “hold the case, as it were, in suspension between two opposing interpretations of it” allowing all of its peculiarities and nuances to be fully explored before a decision is reached.<sup>409</sup> It can be seen, therefore, that were judges to decide the issues before each side had a chance to make its case, this would invalidate the adversarial mode of legal proceeding.<sup>410</sup> To avoid this, the judiciary is largely kept from participating in the proof process. In this way, the exclusion of the judiciary from the proof process may be seen to reflect, not only the natural dominance of the parties within the adversarial tradition, but also the concern that judicial neutrality will be affected.

To further ensure their neutrality, the judiciary is not entrusted with deciding the verdict in a criminal trial. This task falls, instead, to the jury as official fact-finding

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<sup>405</sup> McEwan (1992), p 15.

<sup>406</sup> Jackson and Doran (1995), p 68.

<sup>407</sup> Fuller (1961), p 35.

<sup>408</sup> *Ibid.* at p 43.

<sup>409</sup> *Ibid.* at p 44.

<sup>410</sup> Of course, in jury trials it is not for the judge to decide the verdict. However, there is the danger that the judge will influence the jury’s decision-making. Therefore, even in jury trials, the need for the trial judge to retain his neutrality is paramount.



body.<sup>411</sup> It is considered that if judges were to perform this task, they would use it as a vehicle for their own interests or for the interests of more powerful bodies. Juries, on the other hand, are comprised of twelve individuals so that the likelihood of self-interested verdicts is much reduced. Another danger of giving judges the power to decide verdicts is that, over time, they may come to prefer certain kinds of litigants over others and so will consistently decide in favour of these litigants, whatever the particular facts of the case.<sup>412</sup> Related to this is the risk that judges may become ‘case-hardened’ and this, say Jackson and Doran, is one argument against the Northern Ireland ‘Diplock-Courts’.<sup>413</sup> Decision-making by juries, on the other hand, is considered to be free from these negative influences by virtue of the fact that jury compilations change from case to case so that there is no such thing as a regular, professional jury. In fact, such is the historical preference for jury trials that even when they became so complex that they could not continue to be used in every case, the preferred alternative was to waive trial altogether rather than to waive jury trial in favour of a trial by a judge or a bench trial.<sup>414</sup> Jackson suggests that so strong is this cultural obstacle to judicial fact-finding that it is responsible for the continuing, if waning, presence of the jury in contemporary criminal trials.<sup>415</sup>

It can be seen, then, that the adversarial model places significant restrictions on the level of activity that trial judges are permitted to indulge in throughout the processing of a case. It is here suggested that this restrictiveness significantly affects both their capacity and their willingness to protect victims during cross-examination.

#### *2.4.1.1 Protecting Victims*

The extent to which judges protect victims from abusive cross-examination is directly related to the level of activity in which they are permitted to indulge. This can be seen from the inquisitorial trial context wherein, Pizzi explains, the judiciary play a much more decisive role in the treatment of victims because of their greater freedom to intervene and restrict unfair and irrelevant questioning.<sup>416</sup> Their power to intervene

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<sup>411</sup> However, in the ‘Diplock-Courts’ which operate in special cases in Northern Ireland, there are no juries and so it falls precisely to the judge to decide the case.

<sup>412</sup> Jackson and Doran (1995), p 68.

<sup>413</sup> *Ibid.*

<sup>414</sup> Jackson (1997), p 20.

<sup>415</sup> *Ibid.*

<sup>416</sup> Pizzi (1996).

in this way reflects their generally active role under the inquisitorial model - in complete contrast with the adversarial system, it is the judge who monopolises inquisitorial proceedings, determining the contours of the dispute within the ambit of the substantive law and gathering, testing, and evaluating the evidence relevant to the dispute.<sup>417</sup> Further, after actively pursuing the facts and availing of all evidence, including witnesses, it is the judge himself who decides the verdict.<sup>418</sup>

Theoretically, then, the failure of our judiciary to protect victims from abusive cross-examination may be explained in terms of the restrictions placed on them by the adversarial model. However, it seems that, in practice, adversarial trial judges are by no means as restricted as the previous discourse would suggest. Jackson tells us that, in fact, they have a long history of playing a much more active role in trial proceedings.<sup>419</sup> He explains that English judges historically played much more than an umpireal role and when lawyers did come to dominate the trial process, judges never ceased to exercise what may be classified as inquisitorial rather than umpireal powers.<sup>420</sup> These include powers to amend indictments, call witnesses and withdraw weak cases from juries.<sup>421</sup> In fact, Jackson explains, not only are judges empowered to undertake certain fact-finding responsibilities, but they may be under a *duty* to do so.<sup>422</sup> Jackson explains that judges also enjoy a broad latitude to comment on the evidence in summing up to the jury and may even put forward certain defences which

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<sup>417</sup> Jackson and Doran (1995), p 67.

The degree of control vested in inquisitorial judges derives from the objective behind the inquisitorial legal process. That is, whilst the adversarial criminal process is geared towards conflict resolution, the inquisitorial model is dedicated to truth-discovery (see note 269 above and accompanying text). Following from this, just as the adversarial model adopts a contest morphology as the best means of achieving its objective, the inquisitorial mode of legal proceeding takes the form of an official unilateral inquiry (Damaska (1973), p 564). The bias of the parties naturally precludes them from leading this inquest and so the task necessarily falls to an independent third party - the judge - who then monopolises the proceedings. This high level of judicial activity is supported by the inquisitorial model's tendency to trust its officials so that great faith is placed in the neutrality of trial judges, despite their active, inquiring role (Ellison (1998), p 617).

<sup>418</sup> McEwan (1992), p 6.

It can be seen, then, that because of the power vested in the judge, inquisitorial lawyers do not exert anywhere near the same degree of control as do their adversarial counterparts (Jackson and Doran (1995), p 67). McEwan explains that the more active the court itself, the less important the role of legal counsel (1992, p 9). In addition, inquisitorial systems have no use for jury trials.

<sup>419</sup> Jackson (1997), p 18.

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*



have not been raised by the defence but are available on the evidence.<sup>423</sup> Ultimately, McEwan explains, “the passive umpire is a creature of theory rather than practice”.<sup>424</sup>

Ironically, this extension of the umpireal role is attributable, at least in part, to the contest nature of adversarial trial proceedings. This is because under the contest model the legitimacy of the verdict depends heavily on procedural integrity.<sup>425</sup> Therefore, particularly in light of the degree of control vested in the protagonists, the observance of rules regulating the argument and ensuring their proper conduct assumes great importance.<sup>426</sup> Unregulated, Damaska explains, the contest would “provoke reprisals, spinning off additional conflict rather than containing or absorbing the existing one” and, thus, the core objective of the adversarial legal process would be defeated.<sup>427</sup>

The trial judge plays an important role within this context and this is to ensure that the parties abide by the rules regulating their contest.<sup>428</sup> Ellison explains that judges have an “overriding duty to ensure fairness of criminal proceedings”.<sup>429</sup> To facilitate this role, a number of powers and duties exist which enable judges to play a much more active part than that contemplated for the truly passive judge, the *sine qua non* of the pure adversarial model. In fact, there is a considerable body of caselaw outlining the acceptable parameters of judicial activity.<sup>430</sup> Particularly pertinent to the issue of

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<sup>423</sup> *Ibid.*

For example, the trial judge must put the defence of provocation to the court if there is sufficient evidence to make it a reasonable possibility. This must be done even if it means going against defence counsel’s wishes as where he intends to make the tactical gamble that the jury, when confronted with the stark alternative either to convict of murder or to acquit, will choose the latter. This objective may be thwarted by the introduction of the provocation defence for this provides the jury with a less extreme third option - the manslaughter verdict. Damaska says that judicial interference with the “proof strategies” of the parties in this way goes against *pure* adversariness for, he explains, the autonomy of the parties in managing the lawsuit should not be interfered with, nor should the tactical interests of the litigants, as they perceive them, be second-guessed, even if this autonomy results in substantial distortion of what the adjudicator takes to be proper factual determinations (1986, p 112).

<sup>424</sup> McEwan (1992), pp 14, 15.

<sup>425</sup> Damaska (1986), p 101.

<sup>426</sup> Damaska (1973), p 564.

<sup>427</sup> Damaska (1986), p 98.

<sup>428</sup> Damaska (1973), pp 563, 564.

But, Damaska says, in a *pure* adversarial model, the judge’s attitude should still be one of passivity for he should rule on the propriety of conduct only upon the objection of the side adversely affected (*loc. cit.*).

<sup>429</sup> Ellison (1998), p 609.

<sup>430</sup> The classic statement of the English trial judge’s function is to be found in the judgement of Denning LJ in the civil appeal case, *Jones v National Coal Board* [1957] 2 QB 55:

The judge’s part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates

victim protection is the common law duty that trial judges restrain unnecessary, protracted cross-examination.<sup>431</sup> This duty extends to ensuring that cross-examination is not conducted in an unfair or oppressive manner.<sup>432</sup> Of further significance are the principles which govern the judiciary's discretion to disallow cross-examination as to credit. These are set out in *Hobbs v Tinling* wherein Sankey LJ held that judges should intervene to prevent improper cross-examination if questioning relates to matters so remote as to have negligible impact on the credibility of the witness.<sup>433</sup> This duty is derivative of the judiciary's general obligation to ensure that any evidence going before the court is relevant.<sup>434</sup>

All in all, it seems that our trial judges have considerable powers of intervention, giving rise to the common assumption that they are well equipped to protect victims. McEwan, for example, argues that judges have the power to prevent some of the worst abuses of cross-examination.<sup>435</sup> This attitude is manifest also in the recommendation of the Royal Commission on Criminal Justice that trial judges adopt a firmer stance in protecting witnesses from the excesses of counsel.<sup>436</sup> However, the obvious implication from the treatment of victims during cross-examination is that trial judges are not exercising their powers of intervention properly, even in extreme instances.<sup>437</sup> Why is this? Ellison explains that this is because there is an "irreconcilable conflict" between the role of the adversarial trial judge and his duty to restrain unnecessary and improper cross-examination.<sup>438</sup> This conflict arises because, whilst there is an area of permissible activity, it is also possible for judges to intervene excessively or inappropriately and this may lead to re-trials or quashed convictions. Therefore, judges are wary of straying too far from their original role of passive umpire even in instances clearly calling for their intervention.

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behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies (*loc. cit.* at 64 ).

It should be noted that in *criminal* cases it is for the jury to make the ultimate decision on the truth.

<sup>431</sup> See *Mechanical and General Inventions Co. Ltd. and Lehwess v Austin Motor Co. Ltd.* [1935] AC 346; *Kalia* [1975] Criminal Law Review 181.

<sup>432</sup> See *Wong Kam-ming v R* [1980] AC 247 at 260.

<sup>433</sup> [1929] 2 KB 1 at 51.

<sup>434</sup> Wigmore explained this duty as follows:

...the judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning, has constantly seen fit to exclude matter that does not rise to a clearly sufficient degree of value (1940, p 969).

<sup>435</sup> McEwan (1992), p 15.

<sup>436</sup> Home Office (1993), para 182.

<sup>437</sup> Chapter One, section 1.2.



There are two main occasions when judicial intervention may be deemed excessive or inappropriate and thereby lead to an appeal. The first of these is where the intervention is seen to interfere with the basic adversarial principle that each side should proceed largely unhindered to present its case to the court.<sup>439</sup> Saltzburg identifies this as arguably the most important principle in the adversary system on the basis that it enables the parties to present their strongest arguments to the tribunal of fact and he goes on to illustrate how excessive or inappropriate judicial intervention can thwart the proof strategies of the parties in this regard.<sup>440</sup> Doran explains that the argument that judicial intervention renders the form of the trial “alien to the tenets of the adversary system” has provided a “more theoretical line of attack” for defence counsel to successfully appeal convictions on the basis of unacceptable intrusions.<sup>441</sup> He explains that this was the line taken in *Gunning* where the Court of Appeal concluded that

...when a judge’s interventions were on such a scale as to deprive the accused of the chance, to which he was entitled under the adversarial system, of developing his evidence under the lead and guidance of defending counsel, the trial must be regarded as a mistrial even in the absence of an allegation that the judge’s questioning was hostile to the accused.<sup>442</sup>

The later appeal of *Matthews and Matthews* relied on the same argument.<sup>443</sup> There, counsel contended that the effect of the interventions was to substitute an inquisitorial process in the Continental mould. Doran explains that whilst the Court concluded that the development of the applicant’s case had not been defeated from its true course (as had happened in *Gunning*), the propriety of counsel’s submission was accepted.<sup>444</sup>

The second problem with judicial intervention is that the judge may be seen to have developed a commitment to one side or the other.<sup>445</sup> This is forbidden under the adversarial model for, in keeping with their role as umpire, judges are required to be wholly neutral. As Lord Devlin stated:

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<sup>438</sup> Ellison (1998), p 609.

<sup>439</sup> See *Hirock and Others* [1970] 1 QB 67; *Hamilton* [1969] Criminal Law Review 486.

<sup>440</sup> Saltzburg (1978).

See also note 423 above.

<sup>441</sup> Doran (1989), p 1149.

<sup>442</sup> [1980] Criminal Law Review 592.

<sup>443</sup> (1983) 78 CAR 23.

<sup>444</sup> Doran (1989), p 1149.

<sup>445</sup> Jackson and Doran (1995), p 65.

It is always open to the judge to probe, but the tradition is strong that he is an arbiter and not an inquisitor and that the coming to the aid of a party in distress might impair his impartiality.<sup>446</sup>

Doran explains that the danger is that the jury will be improperly influenced.<sup>447</sup> This is quite likely given that the judge may well be considered to be more authoritative than the lawyers for the parties.<sup>448</sup> Doran tells us that many of the appellate decisions in this area of judicial intrusion have been based squarely on the possible prejudicial effects of the judge's intervention on the jury's decision-making process.<sup>449</sup> A case in point is *Rabbitt* in which the trial judge had asked questions of witnesses which tended to suggest that he himself was satisfied about the defendant's guilt.<sup>450</sup> For example, he asked one witness, "You are very glad you did not employ him [the defendant]?" This question was answered in the affirmative and Doran explains that the effect was thus to convey to the jury, "you are pleased you did not engage a man who has committed the crime with which the appellant was charged".<sup>451</sup>

### *Summary*

Traditional rape commentators allude to a judiciary unwilling to intervene to protect rape victims because of a specific prejudice against them. However, this proposition does not account for the fact that judges are not intervening enough to protect victims in other trial contexts either. The previous discussion revealed that, in fact, adversarial judges generally take a non-interventionist stance and that they do this, not out of bias towards particular victim-groups, but because of the constraints placed on judicial activity by the adversarial tradition.

The adversarial trial judge is an impartial umpire who is expected to remain somewhat aloof from the party contest.<sup>452</sup> High levels of judicial activity threaten to undermine this traditional umpireal role and, consequently, judges are wary of intervening to protect victims. This hesitancy persists despite the fact that a certain amount of judicial activity is permitted in the name of protecting victims. This is because the line between permissible and impermissible activity in this regard is by

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<sup>446</sup> Devlin (1979), p 62.

<sup>447</sup> Doran (1989), p 1147.

<sup>448</sup> Jackson and Doran (1995), p 65.

<sup>449</sup> Doran (1989), p 1147.

<sup>450</sup> (1931) 23 CAR 112.

<sup>451</sup> Doran (1989), p 1147.



no means clearly marked and since the penalty for getting it wrong is an overturned conviction, adversarial judges are faced with a considerable dilemma when it comes to stepping in to protect victims. Ellison explains that adversarial judges, in fact, “tread a judicial tightrope” when they intervene in the course of a criminal trial to protect victims.<sup>453</sup> Ultimately, the structural constraints within which the adversarial trial judge must exercise his discretion preclude adequate protection of victims, whether in rape or non-rape trials, from irrelevant and inappropriate questioning.<sup>454</sup> Traditional rape literature largely overlooks this factor and implies, instead, that the judiciary don’t protect rape victims because they simply don’t care about them.

## 2.5 Conclusion

As explained, this thesis aims to suggest ways in which the rape victim’s experience throughout the criminal justice process might be improved. Fundamental to this objective is a proper understanding of the reasons behind the maltreatment of this victim-group for it is these which any reform proposals must address if real improvement is to be achieved. This present chapter has, therefore, been concerned to provide an accurate explanation of the treatment of rape victims as outlined in Chapter One above. The traditional perspective is that this maltreatment is the product of prejudicial attitudes towards this specific victim-group. However, Chapter One’s finding that rape and non-rape victims actually have a great deal in common in terms of their negative courtroom experiences naturally undermines this argument - it cannot be expected that there are separate causes behind their shared experiences. The better explanation is that the like experiences of rape and non-rape victims are attributable to a common factor. This present chapter has duly found that this common factor lies within the structural and functional features of our criminal justice system - section 2.2 revealed that the brutality of cross-examination is an inescapable feature of the adversarial trial process, section 2.3 showed that the perceived inadequacies of prosecuting counsel derive from the victim’s lack of status within the criminal process and section 2.4 explained the judiciary’s failure to protect victims from abusive cross-examination in terms of the conflict between their traditional role

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<sup>452</sup> Ellison (1998), p 611.

<sup>453</sup> *Ibid.* at p 610.

<sup>454</sup> *Ibid.* at p 611.

as passive umpire and their duty to curtail improper and inappropriate cross-examination.

Ultimately, by recognising the impact which these structural factors have on the experience of victims as a whole, this thesis is well on its way towards understanding the treatment of rape victims and, following from this, is better placed to achieve its central objective of providing effective reform proposals. However, so far, only a partial exploration of the rape victim's experience at court has been undertaken. The following chapter, therefore, develops this analysis by examining three further crucial aspects of her trial experience - the use of sexual history evidence, the corroboration warning and the operation of section 1(f)(ii) of the Criminal Evidence Act 1898.



## *Chapter Three*

### *Rape Victims Singled Out*

#### *3.1 Introduction*

The myth of equal justice for all is nowhere more blatantly exposed than in a rape trial.<sup>455</sup>

As explained, the shoddy treatment of rape victims within the criminal justice system is a well-documented fact, recently receiving governmental ratification by way of a report highlighting a number of areas of concern<sup>456</sup> and subsequent legislative reform.<sup>457</sup> Prompted by this state of affairs, this thesis aims to explore the treatment of rape victims at court with a view to providing suggestions for improving their experience at this stage of the criminal justice process and also beyond. To this end, it is intended to obtain a fully accurate understanding of the source of the problems which it is sought to eradicate. This has already been achieved to some extent throughout the course of Chapters One and Two wherein the brutal nature of cross-examination and the joint inadequacy of prosecuting counsel and judiciary were attributed to the structural and functional features of the Anglo-American criminal justice system.

However, the matters discussed in Chapters One and Two represent only some of the difficulties experienced by rape victims at court and, in fact, the gravest criticism of the rape trial has yet to be examined. This is that the rules of evidence which apply in a trial for rape permit rapists to avoid conviction. The specific rules in question concern the separate issues of sexual history evidence, corroboration and the accused's bad character.<sup>458</sup> Following Chapter One's format, this present chapter will examine how these evidential rules operate in the context of the rape trial and also how they equate with the conduct of criminal trials generally. As explained, this type

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<sup>455</sup> Lees (1997), pp 61, 62.

<sup>456</sup> Home Office (1998).

<sup>457</sup> The Youth Justice and Criminal Evidence Act 1999.

<sup>458</sup> The corroboration warning rule was finally abolished in 1994 by way of section 32(1) of the Criminal Justice and Public Order Act. However, as will be shown, it remains highly pertinent to the evaluation undertaken in this thesis.

of comparative approach is critical if a proper understanding of the problems facing rape victims is to be achieved and, in turn, effective reform proposals are to be made.

### 3.2 *Sexual History Evidence*

Nineteenth century England saw the establishment of certain common law rules pertaining to the use of sexual history evidence in rape trials. These rules were based on the notion that a complainant's chastity was directly probative of both her credibility and whether or not she consented to the intercourse in question. In other words, it was thought that unchaste women were more likely to lie than those who were chaste and were also much more likely to consent indiscriminately to sexual intercourse.<sup>459</sup>

Accordingly, when a man accused of rape sought to rely on a defence of consent, he was entitled to prove the entire relationship subsisting between him and the victim, including consensual sexual acts indulged in before or after the act charged.<sup>460</sup> In addition, he was entitled to adduce affirmative evidence of specific acts of intercourse between her and unnamed men and to cross-examine in anticipation thereof to prove that the complainant was or had been a common prostitute or had a reputation in the community for being indiscriminately promiscuous.<sup>461</sup> Secondly, evidence of sexual misconduct on the part of the complainant which was not covered by the charge or which was not incidental to her relationship with the accused or which was not tantamount to prostitution or indiscriminate promiscuity was not considered to have any bearing on the issue of consent but was, instead, held to be relevant solely to the issue of credibility. Since credibility is a collateral matter, although the complainant could be cross-examined by the defence about any such relationship, her answers in this regard had to be taken as final and, as such, evidence could not be led to contradict her.<sup>462</sup>

These rules were carried forth into twentieth century English criminal law where little if anything was done to modify them or to regulate the adduction of such evidence

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<sup>459</sup> McColgan (1996), p 280.

<sup>460</sup> *Riley* (1887) 18 QBD 482.

<sup>461</sup> *Clay* (1851) 5 Cox CC 146; *Barker* (1829) 3 Car & P 588; *Tissington* (1843) 1 Cox CC 48; *Krausz* (1973) 57 Crim App Rep 466.

<sup>462</sup> *Holmes* [1871] LR 1 CCR 334.



until 1976 when the Sexual Offences (Amendment) Act was enacted.<sup>463</sup> Section 2 of this Act purported to restrict the admissibility of sexual history evidence by requiring trial judges to exclude it unless they were “satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked”.<sup>464</sup> This measure was, however, notoriously ill-fated and women continued to be systematically cross-examined about the details of their sexual behaviour with men other than the defendant.<sup>465</sup> In addition, the Court of Appeal tended to undermine the efforts of those trial judges who did seek to adhere to the spirit of section 2. Temkin explains that the willingness of the Court of Appeal to see a wide range of evidence as relevant to consent meant that trial judges who refused to allow in sexual history evidence did so at some considerable risk of a quashed conviction on appeal.<sup>466</sup> Ultimately, commentators claim, the situation actually worsened following the 1976 reform. McColgan, for example, argues that section 2, designed to narrow the common law scope for the introduction of sexual history evidence, was in fact interpreted so as to *widen* the circumstances in which such evidence could be introduced.<sup>467</sup>

Therefore, throughout the last two centuries, the introduction of the complainant’s sexual history has formed the centre-piece of the rape trial, provoking more criticism than any other single aspect of the law of rape.<sup>468</sup> Now, at the turn of the twenty-first

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<sup>463</sup> This legislation followed the Heilbron Committee’s finding that:

...procedures have developed in regard to cross-examination and to a much lesser degree the admission of evidence generally which many now regard as inimical to the fair trial of the essential issues but which may also result in the complainant suffering humiliation and distress... We have come to the conclusion that, unless there are some restrictions, questioning can take place which does not advance the cause of justice but in effect puts the woman on trial... (Heilbron Committee (1975), para 91).

<sup>464</sup> The Northern Ireland equivalent is article 4 of the Sexual Offences (NI) Order 1978.

<sup>465</sup> See, for example, Adler (1982), (1987); Temkin (1987), (1993); Lees (1989), (1996), (1997); McColgan (1996); Home Office (1998).

Why section 2 failed to achieve its objective will be apparent following Chapters Four and Five of this thesis.

<sup>466</sup> Temkin (1993), p 17.

In fact, she says that, whilst the Court of Appeal is generally unwilling to quash decisions of trial courts, the chances of a successful appeal in cases where trial judges have excluded sexual history evidence have never been better (*loc. cit.* at p 20).

<sup>467</sup> McColgan (1996), p 276.

Barbara Hewson QC similarly observes that whilst sexual history evidence used to be admitted in two situations (where the woman was either a prostitute or known to have sexual relationships with a lot of men and where she had had previous sexual relationships with the defendant), following section 2 such evidence is being admitted in a whole range of cases and the result is that a defence barrister “more or less has an expectation that a judge will allow him to go fishing around in the victim’s past, which is, ironically, the very thing that the legislation was supposed to prevent” (*Dispatches*, Channel 4, February 1994).

<sup>468</sup> McNamara (1981), p 26.

century, a fresh attempt to curtail the use of such evidence has been made. Since April 2000, the admissibility of sexual history evidence has been newly governed by sections 41 to 43 of the Youth Justice and Criminal Evidence Act 1999. Although much more restrictive than section 2, this new legislation still permits sexual history evidence to be adduced in certain situations. The potential value of this latest reform is assessed in Chapter Five of this thesis wherein it will be shown that, on its own, section 41 will not significantly reduce the introduction of such evidence.<sup>469</sup> Consequently, it remains pertinent to outline why this aspect of the law of rape is so objectionable.

### *3.2.1 Sexual History Evidence and Relevance*

A major objection to the adduction of sexual history evidence is the acute distress and humiliation which is caused to complainants by dissecting their sexual life in open court. Lees describes the process as “judicial rape” and explains that many victims find the experience as humiliating as the actual rape.<sup>470</sup> Indeed, she argues that this judicial rape is worse than the actual rape being “more deliberate and systematic, more subtle and more dishonest, masquerading in the name of justice”.<sup>471</sup> A further criticism is that the notorious humiliation suffered by rape complainants as a consequence of exposing their private life and sexual past deters many victims from reporting their rape.<sup>472</sup> In the words of one commentator:

[M]uch injustice has been done because victims of rape were fearful of the legal process itself, notably the horrendous experience of cross-examination about remote and irrelevant aspects of sexual behaviour. Many victims failed or refused to put themselves through this experience, and many rapists escaped unpunished, to attack again.<sup>473</sup>

However, the ultimate criticism is that by introducing the complainant’s sexual history to the court the conviction of rapists is severely inhibited.<sup>474</sup> A major reason for this is the hugely prejudicial impact of this type of evidence. The fact that juries are less willing to convict in cases where they have heard evidence of reputed unchastity and sexual promiscuity is well documented. In the United States, for

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<sup>469</sup> Chapter Five, section 5.2.1.

<sup>470</sup> Lees (1997), p 53.

<sup>471</sup> *Ibid.*

<sup>472</sup> McNamara (1981), p 25.

<sup>473</sup> Woods (1981), p 4.

<sup>474</sup> See, for example, Temkin (1993); Lees (1996); McColgan (1996).



example, Kalven and Zeisel found that in rape cases the jury “often harshly scrutinises the female complainant particularly, it would seem, where she has a sexual history”.<sup>475</sup>

However, whilst cross-examining complainants about their sexual history or otherwise adducing such evidence is certainly the most distasteful aspect of the rape trial, the fact remains that, as an integral part of his right to a fair trial, the accused is entitled to adduce all evidence relevant to his defence. Therefore, insofar as the complainant’s sexual activities are relevant to an issue in the case, evidence of such must be admitted regardless of her feelings. However, the argument put forward by many commentators is that the admission of much sexual history evidence has been inconsistent with ordinary, common law notions of relevance. For example, Home Office research conducted just prior to the 1999 reform revealed that

The extent of the use of such evidence seems to go far beyond that demanded in the interests of relevance to the issues in the trial and suggests that it is used, contrary to section 2, in an attempt to discredit the victim’s character in the eyes of the jury. This goes beyond the need for fairness to the defendant, who is protected from exposure to questioning on his own previous misconduct.<sup>476</sup>

Moreover, in 1975, the Heilbron Committee concluded that “a woman’s sexual experience with partners of her own choice is neither indicative of untruthfulness nor of a general willingness to consent”, thereby denouncing the existence of any *general* probative link between chastity and either consent or credit.<sup>477</sup>

### 3.2.1.1 *Sexual Activities Relevant to Consent*

Will you not more readily infer assent in the practiced Messalina in loose attire, than in the reserved and virtuous Lucretia?<sup>478</sup>

The United States Federal Rules of Evidence define relevant evidence as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without

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<sup>475</sup> Kalven and Zeisel (1966), p 249.

See also Catton (1975); Bordiga and White (1978); La Free, Reskin and Vischer (1985); Adler (1987) and Brown, Burman and Jamieson (1993).

<sup>476</sup> Home Office (1998), para 9.63, p 69.

<sup>477</sup> Heilbron Committee (1975), para 131.

See also McColgan (1996) for an in-depth analysis of the relevance of sexual history evidence.

<sup>478</sup> Eisenbud (1975), p 403.

the evidence”.<sup>479</sup> In this way, the legal concept of relevance can be seen to depend not only upon a logical link being established between the evidence and an issue to be proved, but also upon the strength of that link.<sup>480</sup> In other words, legal relevancy denotes something more than a minimum of probative value; each single piece of evidence must have a “plus value”.<sup>481</sup> Similarly, according to Thayer, evidence “must not merely be remotely relevant, but proximately so”.<sup>482</sup>

McColgan argues that in order for sexual activity to be properly relevant to the issue of consent, it must be accepted that the group of women who have sexual intercourse with men to whom they are not married is sufficiently small, in comparison with the group which does not.<sup>483</sup> However, in contemporary society, the position is that the proportion of women who engage in non-marital sexual relations is overwhelming in relation to the proportion who do not. Therefore, McColgan explains, evidence that a woman belongs in the former group is not relevant to the issue of consent because this membership does not distinguish her from the norm.<sup>484</sup> The Heilbron Committee similarly explained that the permissiveness of modern society means that a woman’s sexual experience cannot be taken as a general indicator of either untruthfulness or consent.<sup>485</sup>

Indeed, even in nineteenth century England when extra-marital sex was much less common, the common law refused to accept the proposition that chastity was generally probative of consent. That is, save where evidence of sexual activities came within one of the exceptional categories, it was considered to have no weight in relation to the issue of consent.<sup>486</sup> The exceptions concerned evidence of the complainant’s prostitution or “notoriously immoral character for lack of chastity”, and evidence concerning sexual contact between the complainant and the defendant. This narrow approach is surprising considering the Victorian attitude towards sexual matters. McColgan explains that, during this era, women who engaged in extra-

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<sup>479</sup> Federal Judicial Centre (1975), Rule of Evidence 401.

<sup>480</sup> McColgan (1996), p 284.

<sup>481</sup> Wigmore (1940), p 969.

<sup>482</sup> Thayer (1898), p 516.

<sup>483</sup> McColgan (1996), p 285.

<sup>484</sup> *Ibid.* at pp 285, 286.

<sup>485</sup> Helbron Committee (1975), para 131.

<sup>486</sup> McColgan (1996), p 283.



marital sex were often perceived as mentally abnormal.<sup>487</sup> This was because the Victorian attitude to female sexuality rested upon an accepted distinction between ‘good’ and ‘bad’ (asexual and sexual) women. Good women were “not very much troubled with sexual feeling of any kind” and remained as virgins until married; bad women, described as nymphomaniacs, derived pleasure from sex and were “low and vulgar”.<sup>488</sup>

Today, however, judicial interpretation of section 2 of the Sexual Offences (Amendment) Act 1976 may be seen to constitute a “volte-face” in terms of the law’s previous categorisation of sexual history evidence as generally irrelevant to consent.<sup>489</sup>

In *Viola*, an early decision concerning section 2, Lord Lane stated that

[I]f questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed merely to credit, they are likely to be admitted.<sup>490</sup>

Temkin explains that this left the door open for rulings that evidence of past sexual experience is in any particular case relevant to the issue of consent and therefore admissible.<sup>491</sup> The caselaw following *Viola* reveals that this is precisely the approach being taken, the Court of Appeal evidencing a particular willingness to see a wide range of sexual history evidence as relevant to consent.<sup>492</sup>

On analysis, much of the sexual history evidence being admitted under section 2 depends, in the first instance, upon the acceptance that unchaste women are more likely to consent to sexual intercourse.<sup>493</sup> That is, women who have consented to non-marital sexual relations in the past are, by simple virtue of this prior activity, presumed to have consented to the intercourse forming the rape allegation. Eisenbud supports the use of sexual history evidence for this purpose:

Regardless of the value judgment made by society about pre-marital or extramarital sexual behaviour, its characterisation will not alter the fact that people who engage in a certain type of behaviour are more likely to engage in that behaviour at any

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<sup>487</sup> *Ibid.* at p 284.

<sup>488</sup> *Ibid.*

<sup>489</sup> *Ibid.* at p 282.

<sup>490</sup> [1982] 1 WLR 1138 at 1142.

<sup>491</sup> Temkin (1993), p 5.

<sup>492</sup> For a review of the caselaw following *Viola*, see Temkin (1993) and McColgan (1996).

<sup>493</sup> McColgan (1996), p 283.

randomly selected moment than are people who have never engaged in that behaviour before.<sup>494</sup>

However, McColgan illustrates the spuriousness of this reasoning by drawing an analogy with a man having a reputation for generosity, asking is it more likely that he consented to the appropriation of his possessions in a case where he alleges theft, than a man with a reputation for meanness.<sup>495</sup> She answers that neither his generosity nor a rape complainant's sexual past render it more likely that they consented to the activities of which they now complain.<sup>496</sup> In fact, the use of character evidence for the purpose of demonstrating the probability that one with a certain moral trait acted conformably with his nature at the specific time in question is generally strictly prohibited.<sup>497</sup> Therefore, the use of sexual history evidence to show consent on the basis of propensity to act can be seen to fly in the face of an important rule of evidence.<sup>498</sup>

### 3.2.1.2 *Sexual Activities Relevant to Credit*

No evil habitude of humanity so depraves the [female] nature... as common, licentious indulgence. Particularly this is true of women whose character is virtue, whenever that is lost, all is gone; [their] love of justice, sense of character and regard for truth.<sup>499</sup>

McNamara explains that the purpose of cross-examination as to credit is to elicit material which will support an inference that the witness is not to be believed on his oath.<sup>500</sup> Therefore, it is proper during cross-examination to disparage the conduct and credibility of the witness if there are reasonable grounds for such an attack.<sup>501</sup> Axiomatically, where bad character or previous misconduct is relied upon as casting doubt on the witness's reliability and veracity, the character or conduct must be such as to involve a moral failure on the part of the witness which makes it more probable than not that he is not telling the truth.<sup>502</sup> That is, there must be an element of recent

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<sup>494</sup> Eisenbud (1975), p 415.

<sup>495</sup> McColgan (1996), p 285.

<sup>496</sup> *Ibid.*

<sup>497</sup> Berger (1977), p 19.

<sup>498</sup> *Ibid.*

<sup>499</sup> *Camp v State* [1847] 3 Ga 417 at 422.

<sup>500</sup> McNamara (1981), p 28.

<sup>501</sup> *Ibid.*

<sup>502</sup> *Ibid.*



dishonesty, betrayal of trust or confidence, unscrupulous behaviour, unreliability or dereliction of duty.<sup>503</sup> In rape trials, non-marital sexual activity could be put to the complainant during cross-examination in order to impugn her.

The assumption of a link between chastity and truthfulness operates only in sexual offence trials, past sexual activity in general not being accepted as having any bearing upon the trustworthiness of a witness.<sup>504</sup> Moreover, only women stand to have their reliability tested in this way:

It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man, predicated upon character for chastity. What destroys the standing of the one in all walks of life has no effect whatever on the standing for truth of the other.<sup>505</sup>

Following from this, Lees observed that whilst the rape complainant’s reputation is judged on the basis of her assumed sexual character and past sexual history, the two main factors deemed to be relevant to the accused’s credit are his occupation and lack of previous criminal record.<sup>506</sup>

The exceptional treatment of rape complainants in this respect derives from Hale’s assertion that sexual offence complainants have a greater tendency to lie than any other type of witness and, relatedly, that unchaste complainants are the most untrustworthy of all.<sup>507</sup> However, the basis on which it can be said that women who indulge in extra-marital intercourse can for that reason alone not be taken at their word has to be questioned. As McEwan says, “the logic of cross-examination on sexual history designed to discredit the prosecutrix is not obvious; the most extensive promiscuity does not suggest that a woman is not honest”.<sup>508</sup> McColgan says that, in fact, no evidence has ever been preferred in support of this notion - there simply is no logical link between sexual behaviour and truthfulness *per se*.<sup>509</sup> Rather, she explains, the perceived relevance of sexual history is to the complainant’s *moral*, rather than

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<sup>503</sup> *Ibid.*

<sup>504</sup> McNamara (1981), p 28; Temkin (1984), p 946; McColgan (1996), p 280.

<sup>505</sup> *State v Sibley* 131 Mo. 519, 532, 33 S.W. 167, 171 [1895].

<sup>506</sup> Lees (1996), p 131.

<sup>507</sup> Hale (1736), pp 633, 635.

<sup>508</sup> McEwan (1992), p 104.

<sup>509</sup> McColgan (1996), p 281.

her *probative* credibility.<sup>510</sup> Probative credibility relates to the truth-value of a witness's testimony whereas moral credibility relates to his or her standing as a person.<sup>511</sup> She explains that sexual history evidence is used to attack the complainant's moral credibility, to suggest that the morality and humanity of the witness is so inferior that no verdict can be based on her testimony, to show the complainant to be "so morally inferior as either not to deserve the court's sympathy or not to provide a suitable foundation for punishing the accused".<sup>512</sup> In other words, it is sought to prejudice the court against the complainant and this, it can be seen, is quite different from demonstrating that she is untruthful.

### 3.2.1.3 Probative Value versus Prejudicial Impact

It can be seen, therefore, that the logical relevance of sexual history evidence to the issues of consent or credit is extremely tenuous.<sup>513</sup> However, the argument against admission of this type of evidence does not rest simply upon its lack of probative value.<sup>514</sup> This is because the legal concept of relevance depends not only upon logical relevance but also upon a balance of that logical weight against the potential dangers flowing from admissibility.<sup>515</sup> In this way, Hoffman explains, legal relevance is "a variable standard, the probative value of the evidence being weighed against the disadvantages of receiving it".<sup>516</sup> Accordingly, Bentham accepted that evidence could properly be excluded on the basis of undue vexation, delay and expense.<sup>517</sup> Thayer, Stephen and Wigmore argued that logically probative evidence could be excluded on the grounds that it might create a multiplicity of issues.<sup>518</sup> McNamara explains that questions which can be categorised as vexatious, indecent, insulting, scandalous,

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<sup>510</sup> *Ibid.*

<sup>511</sup> *Ibid.*

<sup>512</sup> *Ibid.*

<sup>513</sup> Evidence of prior sexual activity might be more relevant to the issue of consent in cases where it pertains to the complainant's previous sexual experience with the defendant himself. However, here too, a connection should not always be presumed. The Scottish Law Commission, for example, instanced the situation of "a chance encounter accompanied by some sexual behaviour many years before the alleged offence" and recommended that sexual relations with the defendant should also be included in any *prima facie* embargo (1983, para 5.5). Commendably, section 41 of the Youth Justice and Criminal Evidence Act 1999 does include evidence of sexual activity with the defendant within its embargo, something which section 2 failed to do.

<sup>514</sup> McColgan (1996), p 286.

<sup>515</sup> *Ibid.*

<sup>516</sup> Hoffman (1975), p 205.

<sup>517</sup> Bentham and Bowring (1838-43), p 599.

<sup>518</sup> See Twining (1985), pp 68-75 and Thayer (1898), p 516.



annoying or needlessly offensive might be disallowed in the discretion of the court notwithstanding some tenuous relevance to a main or collateral fact.<sup>519</sup>

A major factor bearing on the admissibility of logically probative evidence is the potential prejudicial impact of that evidence.<sup>520</sup> That is, in determining whether a particular piece of evidence should be admitted into the trial the judge must consider whether its probative value outweighs its prejudicial nature. This policy is reflected in the general rule that the prosecution shall not be permitted to adduce evidence of the accused's bad character or to cross-examine witnesses for the defence with a view to eliciting such evidence.<sup>521</sup> Wigmore explains that evidence indicating moral disposition may be excluded in this way because its probative value may be exaggerated and "condemnation be visited upon the accused not for the act but virtually for his character".<sup>522</sup>

It has been suggested that rape complainants as a category are more prone than any other witness-group to this type of moral condemnation so that judgments about fact are frequently displaced by, or transformed into, judgments about value.<sup>523</sup> In this way, Grace *et al* explain, questions about consent fall on the boundary between factual and moral domains and, as such, are prey to all the prejudices and preconceptions which many people have about sexual behaviour.<sup>524</sup> Complainants with a sexual past are especially vulnerable to these value judgments, finding it much more difficult to persuade juries that they did not consent to the intercourse in question. This is clear from the numerous studies which have revealed a distinct unwillingness on the part of juries to convict defendants of rape where the complainant's sexual history has been introduced.<sup>525</sup> In Canada, for example, Catton found that any information at all implying that the victim had a prior sex history had the effect of reducing the perceived guilt of the accused regardless of whether this

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<sup>519</sup> McNamara (1981), p 26.

<sup>520</sup> In this context, 'prejudicial' means liable to mislead or provoke an irrational response from the jury or magistrates at the trial itself.

<sup>521</sup> See section 3.4 below.

<sup>522</sup> Wigmore (1940), p 969.

<sup>523</sup> See, for example, Adler (1987); Chambers and Millar (1987); Temkin (1987); Lees (1996), (1998); McColgan (1996).

<sup>524</sup> Grace, Lloyd and Smith (1992), p 12.

<sup>525</sup> See, for example, Kalven and Zeisel (1966); Catton (1975); Bordiga and White (1978); La Free, Reskin and Vischer (1985); Adler (1987) and Brown, Burman and Jamieson (1993).

information was verified.<sup>526</sup> In fact, LaFree *et al* found that juries are so prejudiced against complainants with a sexual past that even evidence that the accused used a weapon or injured the victim may not persuade them of his guilt.<sup>527</sup>

Despite its profoundly prejudicial impact, sexual history evidence is admitted in wholly unwarranted situations. In fact, the policy stipulating that unduly prejudicial evidence be excluded seems to have been completely undermined in the context of sexual history evidence. This can be seen from the dictum in *Lawrence*, the first major case interpreting section 2 of the Sexual Offences (Amendment) Act 1976:

The important part of the statute which I think needs construction are the words “if and only if he (the judge) is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked”. And, in my judgment, before a judge is satisfied or may be said to be satisfied that to refuse to allow a particular question or a series of questions in cross-examination would be unfair to the defendant he must take the view that it is more likely than not that the particular question or line of cross-examination, if allowed, might reasonably lead the jury, properly directed in the summing-up, to take a different view of the complainant’s evidence from which they might take if the question or series of questions was or were not allowed.<sup>528</sup>

The only requirement of admissibility here seems to be that the evidence must be likely to cause the jury to take a different view of the complainant’s testimony than it would have done had they not heard such evidence. Given the reaction of juries to complainants with a sexual past, this is surely a dangerous approach to deciding the admissibility of sexual history evidence.

### 3.2.2 *Sexual History Evidence and Non-Rape Trials*

As well as the extreme distress and humiliation caused to complainants, the introduction of sexual history evidence in rape trials has serious negative ramifications for attrition rates (including reporting) for this crime.<sup>529</sup> The practice is made doubly repugnant by the fact that the admission of much of this type of evidence is inconsistent with the principles of legal relevance. However, Chapter One revealed that complainants in all case-types are routinely subjected to onerous cross-

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<sup>526</sup> Catton (1975), p 173.

<sup>527</sup> La Free, Reskin and Vischer (1985), p 397.

<sup>528</sup> [1977] Criminal Law Review 492 at 493.

<sup>529</sup> See, for example, Temkin (1987); Grace, Lloyd and Smith (1992); Lees (1996).



examination ordeals during which they are made to answer questions which cause them distress, humiliation, frustration and anxiety. Further, it was shown that such questioning frequently bears little or no relevance to either a fact in issue or to the witness's credibility. Rather, much of the abusive treatment of victims during cross-examination is purely tactical, serving a number of insidious objectives and geared ultimately towards winning the verdict.<sup>530</sup>

Following from this, can the practice of cross-examining rape complainants on their sexual history really be taken as evidence that this victim-group is subject to unique treatment at court? Is it not, in fact, simply the case that this type of questioning operates as just another defence tactic, albeit a singularly cruel and effective one? Grace *et al* explain that as in most cases in relation to those offences where consent is a possible defence, if that defence is to succeed, it must necessarily attack the credibility of the complainant.<sup>531</sup> This, they explain, may involve appealing to unfounded generalisations to imply that the complainant's denial of consent was a fraud.<sup>532</sup> Thus, it may be implied that she was promiscuous, sexually provocative or devious and manipulative, on the assumption that jurors will either doubt her general character or her specific claim to have said "no" to the defendant.<sup>533</sup> They add that it is in this type of case that it is often said that the complainant is "on trial".<sup>534</sup> Indeed, it is obvious that defence practitioners often introduce sexual history evidence for purely tactical purposes, seeking to exploit the considerable prejudice which juries tend to have about sexual behaviour. Thus, McNamara explains, it is in the accused's interest to paint the complainant in the worst possible light.<sup>535</sup> Temkin similarly found this to be a very popular defence tactic, quoting one eminent QC who said that he always applies to the judge to admit the woman's sexual past because if she can be "depicted as a slut" the jury will be disinclined to convict.<sup>536</sup>

From this perspective, the adduction of sexual history evidence is really quite indistinguishable from any other tactical device employed by defence counsel during

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<sup>530</sup> See both Chapters One and Two in this regard.

<sup>531</sup> Grace, Lloyd and Smith (1992), p 10.

<sup>532</sup> *Ibid.* at p 11.

<sup>533</sup> *Ibid.*

<sup>534</sup> *Ibid.*

<sup>535</sup> McNamara (1981), p 26.

<sup>536</sup> Temkin (1998), p 17.

cross-examination. The question of why it is not employed in other trial contexts is answerable simply in terms of the specific nature of the rape trial which makes it more conducive to raising sexual matters. However, it is suggested that there *is* a significant point of difference between the generic brutalities of cross-examination as outlined in Chapter One above and the practice in rape trials of introducing the complainant's sexual history. This difference is that the wide latitude enjoyed by defence counsel for abusing victims generally is largely attributable to judicial failure to regulate properly the cross-examination process.<sup>537</sup> In other words, defence counsel are often acting outside of the rules but are simply getting away with it. The systematic degradation of rape victims by examining their sexual life in open court is, on the other hand, a *legitimate* defence exercise deriving from the enduring perception that such evidence is probative of both the issues of consent and credibility. The perceived legitimacy of the treatment of rape victims in this regard is further evidenced by the fact that the judiciary is also known to question complainants on their sexual past.<sup>538</sup> The appellate courts, too, evince their clear endorsement of this type of questioning by frequently upholding appeals brought on the basis of failure to allow such evidence.<sup>539</sup> Therefore, the major anomaly of the use of sexual history evidence in rape trials is that, whilst it generally bears no genuine relevance to either a fact in issue or to the complainant's credibility, it is still a fully endorsed and integral part of the cross-examination of rape complainants.

### *Summary*

Chapter One of this thesis revealed that, contrary to the image traditionally presented in rape literature, victims as a whole are subjected to an extremely arduous cross-examination ordeal.<sup>540</sup> In fact, to a great extent, rape and non-rape complainants suffer an almost identical experience in the witness-box. However, the previous discussion revealed that, in addition to these generic abuses, rape victims are subject to further maltreatment in the form of questioning them about their sexual history (or otherwise adducing such evidence). Whilst victims generally are faced with a tactical onslaught during cross-examination, they are not required to put up with questioning of this type. As such, rape victims clearly endure a much more harrowing ordeal at

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<sup>537</sup> See Chapter One, section 1.4 and Chapter Two, section 2.4.

<sup>538</sup> Adler (1982), p 673.

<sup>539</sup> Temkin (1993); McColgan (1996).



court and, ultimately, are faced with greater obstacles to conviction than victims generally. However, as explained, the fact that sexual history evidence does not feature in trials generally is not what makes its use in rape trials so anomalous. Rather, the real ignominy of the brutalisation of rape victims in this regard is that it is a fully accepted and endorsed practice which has constituted the central feature of the rape trial throughout the last two centuries. Whether or not the Youth Justice and Criminal Evidence Act 1999 will reduce reliance on this most distasteful practice remains to be seen.<sup>541</sup>

### 3.3 *The Corroboration Warning*

Until February 1995, trial judges were obliged to issue a corroboration warning in respect of sexual offence complainants and accomplices giving evidence for the prosecution.<sup>542</sup> The requirement as it applied to children giving sworn testimony had already been abolished in 1988.<sup>543</sup> The obligatory care warning now applies only in cases involving persons who are mentally handicapped where they have made a confession which has not been witnessed by an independent person.<sup>544</sup> The warning consisted of directing the jury that it would be dangerous to convict on the uncorroborated evidence of the relevant witness-groups. Precisely why it was regarded as dangerous had also to be explained. This meant telling the jury that witnesses of the type immediately before them were predisposed to tell lies and possible reasons for this dishonesty would be given. Further, any items of evidence which could serve as corroboration, if accepted by the jury, had to be identified. If there was no such evidence, this too had to be pointed out.<sup>545</sup> Finally, judges had to explain to the jury that, notwithstanding the warning, they were entitled to convict on the uncorroborated testimony if they were satisfied of its truth. Failing to issue this warning or to issue it in the requisite terms constituted a ground for appeal.

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<sup>540</sup> Chapter One, section 1.2.

<sup>541</sup> Chapter Five of this thesis examines the likely effect of this legislation.

<sup>542</sup> This obligation was abolished by section 32(1) of the Criminal Justice and Public Order Act 1994.

<sup>543</sup> This was by virtue of section 34(2) of the Criminal Justice Act. However, magistrates still need to warn themselves of the dangers of convicting on the uncorroborated but sworn evidence of children (Uglow (1995), p 198, note 7).

<sup>544</sup> Section 77 of the Police and Criminal Evidence Act 1984.

<sup>545</sup> Because otherwise the judge's silence may lead the jury to suppose that there is something in the evidence that may be taken to be corroboration, and their only job is to find it (*People (AG) v Moore* [1950] Ir. Jur. Rep. 45; *Anslow* [1962] CLR 101).

As stated, the corroboration warning requirement has now been abolished in respect of sexual offence complainants. Nevertheless, it remains highly pertinent to the evaluation undertaken in this thesis. In the first place, having been abandoned only as late as 1995, it provides a still contemporaneous example of the arbitrary treatment accorded rape victims at court. In the second place, it is not clear that its abolition has brought this treatment to a complete end. This is because, whilst the judiciary are no longer required to issue the warning, they retain a discretion in this regard.<sup>546</sup> Lack of research makes it difficult to ascertain how this discretion is being exercised although *Makanjuola*, the first major case following the reform, did appear to adhere to its spirit.<sup>547</sup> In this case, the Court of Appeal laid down guidelines as to how the judiciary should exercise their discretion to issue the warning. Critically, it was stipulated that there should be an “evidential basis” for suggesting that a witness is unreliable.<sup>548</sup> Where there is no such basis, the accused must rely on the protections available throughout the normal conduct of the criminal trial to protect him from unreliable evidence.<sup>549</sup> In effect, this puts sexual offence complainants and accomplices in the same position as witnesses generally. However, the major drawback of *Makanjuola* is the Court’s statement that it would be “disinclined to interfere” with a trial judge’s exercise of his discretion save where it was *Wednesbury* unreasonable. This plainly leaves those trial judges who would thwart the reform quite free to do so. It is suggested that this tendency will be very high in rape cases for, whilst abolishing the warning may have delegitimised to some extent the traditional perception of sexual offence complainants as liars, the cultural mistrust of this witness-group (of which the corroboration warning was only one manifestation) continues to be very strong.<sup>550</sup> In explaining why the various witness-groups attracted the corroboration warning, the

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<sup>546</sup> Section 32(1) prohibits the issuing of the warning “merely because” the witness concerned is an accomplice or a sexual offence complainant. Birch explains that the purported aim of the reform was not to *prevent* judges from commenting on the credibility of these witness-groups but to require them to make such comment only when required and in terms appropriate to the circumstances of the individual case (1995, p 524).

<sup>547</sup> [1995] 3 All ER 730.

<sup>548</sup> As to what could constitute such a basis, the Court instanced situations where the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge.

<sup>549</sup> The trial judge’s general obligation to direct the jury on the evidence is seen as a major protection in this regard (Law Commission (1991), paras 3.4-3.10 and Appendix C). This duty consists of (a) a general duty to put the defence fairly to the jury and, in doing so, to draw attention to items of the prosecution case which are actually or potentially unreliable or open to criticism, and (b) in specific cases, to give a warning about certain witnesses who may have an interest of their own to serve in giving evidence.

<sup>550</sup> See Chapter Four, section 4.4 below.



following discussion illustrates the singular strength of the attitude of mistrust towards rape complainants.

### 3.3.1 *Justifying the Warning*

The common law holds that, in the absence of some specific rule to the contrary, the testimony of a single witness is sufficient to prove the case against the accused.<sup>551</sup> This principle reflects the presumption that witnesses coming before the courts are generally truthful and reliable.<sup>552</sup> The corroboration warning practice represented a clear exception to this common law rule. The justification for this disparity was that, in complete contrast with the usual approach to witness testimony, the relevant witness-groups were “presumed by the law to be likely to be untruthful”.<sup>553</sup> Therefore, when they gave evidence, it was considered necessary to provide defendants with additional protection against wrongful conviction. Thus, the corroboration direction was given, warning juries in no uncertain terms that these witnesses were inherently untrustworthy. Following this enormously prejudicial direction, juries were required to decide whether they nevertheless believed the particular witness on his or her oath.

It is clear, then, that the witness-groups attracting the corroboration warning were set quite apart from witnesses generally in terms of the attitude towards them and their consequent treatment in court. However, it is suggested that sexual offence complainants were set even further apart for they seem to have been considered less trustworthy than either children or accomplices and, following from this, to be the least trustworthy witness-group of all. This can be seen by examining precisely why these witness-groups were so mistrusted.

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<sup>551</sup> Murphy (1992), p 505.

<sup>552</sup> Certainly, some risk of dishonesty or mistake is conceded but is thought to be adequately offset by the protections existing within the normal conduct of the criminal trial (Dennis (1984), p 332).

### 3.3.1.1 *Accomplices.*

Accomplices were considered to have numerous motives for giving false testimony.<sup>554</sup> For example, it was thought that they might try to exculpate themselves or to minimise their own part in an offence by exaggerating or fabricating the role of the accused. It was also thought that they might be motivated by spite or revenge, as where they believed themselves to have been informed against by the accused. Or perhaps they had purchased immunity from prosecution or obtained a lesser charge or more favourable prospects of early release by ensuring the conviction of others.<sup>555</sup>

### 3.3.1.2 *Children Giving Sworn Evidence*

The perceived unreliability of this witness-group derived from their immaturity and lack of responsibility which, it was thought, led them to lie, exaggerate, fantasise and make mistakes.<sup>556</sup> Dennis explains that it was thought that children would give false evidence out of spite or a desire to make mischief.<sup>557</sup> It was also thought that they were suggestible and easily influenced by adults and other children so that they might be induced to believe a story which was untrue.<sup>558</sup> Children were also considered to be highly imaginative causing them to give grossly coloured testimony.<sup>559</sup> In addition, their powers of observation and memory were considered to be less reliable than those of an adult with the consequence that they might miss important details or fail to understand the significance of what they do see.<sup>560</sup> It was considered that these dangers were compounded by the fact that juries were emotionally swayed by child witnesses, particularly child victim-witnesses.<sup>561</sup>

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<sup>553</sup> McEwan (1992), p 90.

<sup>554</sup> See Wigmore (1940), para 2057; Criminal Law Revision Committee (1972), paras 181-185; Williams (1963), pp 144-147; Heydon (1973); Cross (1979), p 217.

<sup>555</sup> Dennis (1984), p 322.

<sup>556</sup> McEwan (1992), pp 117-124.

<sup>557</sup> Dennis (1984), p 330.

<sup>558</sup> *Ibid.*

<sup>559</sup> *Ibid.*

<sup>560</sup> *Ibid.*

<sup>561</sup> *Ibid.*



### 3.3.1.3 Sexual Offence Complainants<sup>562</sup>

The argument for issuing the corroboration warning was strongest in respect of sexual offence complainants. Commentators forcefully ascribed various and numerous motives for lying to this witness-group. Elliott, for example, listed the following causes for lying: extrication from difficulties caused by arriving home late; becoming pregnant; contracting VD; being caught in the act of intercourse; feelings of guilt about what was done in two minds and is now repented; selective recall which may mean that the incident is genuinely remembered as rape; getting one's own back at an unfaithful, or contemptuous lover; blackmail; and confusions of fantasies with reality.<sup>563</sup> In addition, he explained, operating during the actual giving of evidence in the witness-box, was the prospect of the cruellest public humiliation if the defendant was acquitted for any reason.<sup>564</sup> On an official level, the Criminal Law Revision Committee decried sexual offence complainants in similar terms, explaining that women make false allegations because of "sexual neurosis, jealousy, fantasy, spite or a girl's refusal to admit that she consented to an act of which she is now ashamed".<sup>565</sup>

These and many like statements incorporated the dominant perspective that sexual offence complainants were generally either malicious liars or mentally deluded.<sup>566</sup> As to this latter notion, Dennis explains that it was believed that certain women created fantasies of having been the victim of a sexual attack, or suffered from other rather ill-defined sexual hysteria or neurosis which caused them to press false complaints in the belief that they were genuine.<sup>567</sup> John Henry Wigmore proposed to explain why some women were prone to delusions of this nature, claiming that their "psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environments, partly by temporary

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<sup>562</sup> It should be noted that where the sexual offence complainant was a child, the judge had to give a composite warning comprising the need to be wary of their evidence on two counts - first of all, because of the unreliability of children and secondly, because of the unreliability of sexual offence complainants. As stated, the corroboration warning requirement vis a vis children giving sworn evidence was dropped in 1988. However, the warning against the evidence of sexual offence complainants remained in force until 1994 and so, until then, the evidence of children in sexual offence cases had still to be accompanied by a corroboration warning.

<sup>563</sup> Elliott (1984), p 13.

<sup>564</sup> *Ibid.*

<sup>565</sup> Criminal Law Revision Committee (1972), p 113.

<sup>566</sup> Dennis (1984), p 325.

<sup>567</sup> *Ibid.* at pp 325, 326.

physiological or emotional conditions”.<sup>568</sup> This “unchaste” mentality, he explained, “finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim”.<sup>569</sup>

Children and accomplices were not similarly presumed to be psychologically unbalanced. Glanville Williams, for example, stated that the “*distinctive* reason for the warning in sexual cases is that experience shows that the complainant’s evidence may be warped by psychological processes”.<sup>570</sup> Therefore, in terms of why they were so mistrusted, sexual offence complainants were clearly set apart from the other witness-groups attracting the corroboration warning. Moreover, this extra dimension to the corroboration warning in sexual cases resulted in a much stronger suspicion of this witness-group than either accomplices or children. In the first place, there was seen to be an *added* reason why sexual offence complainants would lie - not only might any number of malicious motives be in operation, but complainants might also be mentally deluded. In the second place, this extra risk was seen to be compounded by the perceived inability of juries to detect it. Williams explained that because of the “subtlety” of the “mental complexes” causing women to lie about sexual matters, the danger of relying on the uncorroborated evidence of sexual offence complainants was not usually “evident to the eye of common sense”.<sup>571</sup> The danger of relying on the evidence of an accomplice, on the other hand, was obvious even to an “unintelligent” person.<sup>572</sup>

This heightened suspicion of sexual offence complainants led many commentators to demand greater protection for defendants in sexual cases than that afforded by the corroboration warning. Williams, for example, argued that whilst permitting juries to convict on the uncorroborated evidence of accomplices “may not be objectionable”, it was “dangerous” in sexual offence cases.<sup>573</sup> The reason for this, he explained, was that

The whole point of giving the warning in sexual cases is that the ordinary man may not realise the possibility of serious psychological abnormality in the complaining

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<sup>568</sup> Wigmore (1940), p 2061, para 924a.

<sup>569</sup> *Ibid.*

<sup>570</sup> Williams (1962b), p 663. (Emphasis added.)

<sup>571</sup> *Ibid.*

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ibid.* at p 669.



witness, even after his attention has been called to it. To tell the jury in such cases that they can disregard the warning, which experience shows to be necessary, is to invite disaster.<sup>574</sup>

Consequently, Williams demanded that all sexual offence accusations be subject to a statutory requirement of corroboration.<sup>575</sup> He also suggested that sexual offence complainants be made to undergo lie-detector (polygraph) testing before their complaint be received.<sup>576</sup> Other commentators have gone even further. Wigmore, for example, suggested that rather than warn the jury of the dangers of uncorroborated evidence, it would be better to employ “expert scientific analysis of the particular witness’s mentality as the true measure of enlightenment”.<sup>577</sup> In this way, he argued, no sexual offence charge should be allowed to go to the jury unless the female complainant’s social history and mental make-up have been examined and testified to by a qualified physician.<sup>578</sup> Another commentator, similarly pressing for rape complainants to undergo psychiatric examination, stated that false accusations are often made by mentally disturbed women. Thus, he said, if the State offered neither corroborative evidence nor a psychiatric report, “it would not be assumed that the witness is a normal individual, notwithstanding the persuasiveness of her testimony”.<sup>579</sup> In other words, all sexual offence complainants would be presumed mentally abnormal unless evidence to the contrary was produced.

Demands for polygraph or psychological testing have never been made with regard to the testimony of accomplices or children. Clearly, then, sexual offence complainants were under much greater suspicion than these other witness-groups. This is further evident from the fact that, when the utility of the corroboration warning finally came under question in the case of accomplices and children, the decisive opinion was that it should be retained in sexual offence cases. For example, in 1972, the Criminal Law Revision Committee advocated abolishing the warning with regard to the evidence of

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<sup>574</sup> *Ibid.*

<sup>575</sup> *Ibid.*

At his time of writing, only the sexual procurement offences covered by sections 2-4 of the Sexual Offences Act 1956 carried this requirement of actual corroboration.

<sup>576</sup> *Ibid.* at p 664.

<sup>577</sup> Wigmore (1940), p 2061, para 924a.

<sup>578</sup> *Ibid.*

Even Glanville Williams recognised that such a practice would represent a huge “indignity” for complainants and “would tend to hinder charges from being brought even when they were clearly well founded” (1962b, p 664).

<sup>579</sup> Anon (1950), p 102.

accomplices.<sup>580</sup> However, it was firmly opposed to such a move in the case of sexual offence complainants, arguing that the “hidden” dangers of their evidence needed to be made known.<sup>581</sup>

Williams similarly felt that the warning should be abandoned in respect of accomplices.<sup>582</sup> He was strongly opposed to the inflexibility of the practice, arguing “why a fixed unvarying rule should be applied to a subject which admits of such endless variety as the credit of witnesses, seems hardly reconcilable to the principles of reason”.<sup>583</sup> Williams also disapproved of the fact that failure to issue the warning in exactly the requisite terms constituted sure grounds for appeal:

It might have been thought that the proper function of a judicial tribunal, both at first instance and on appeal, is to decide whether the defendant is shown on the evidence to have committed a crime, not merely whether the violation of some rigid rule has deprived him of a chance before the jury.<sup>584</sup>

In respect of sexual offence complainants, on the other hand, Williams considered the warning to be absolutely critical, arguing that it provided “almost the only way by which the peculiar dangers of sexual charges are reflected by the legal process”.<sup>585</sup> Curiously, however, Williams did not consider either the inflexibility of the practice or the rigidity of the warning’s content to be at all undesirable in this context. For example, he made no reference to the fact that failure to issue the warning in the requisite terms gave rise to many unmeritorious appeals in sexual cases also.<sup>586</sup> Ultimately, it seems that what Williams regarded as arbitrary in the case of accomplice evidence, he considered to be perfectly acceptable in sexual offence cases. Presumably, he justified this questionable stance on the basis that sexual offence complainants were singularly untrustworthy.

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<sup>580</sup> Criminal Law Revision Committee (1972), para 183 *et seq.*

<sup>581</sup> *Ibid.*

The Committee did admit that there must be some cases where there can be no danger in relying on the uncorroborated evidence of a sexual offence complainant but gave the example of an indecent assault on an elderly woman where the only issue is the identity of the offender. It must be said that this is a rather negligible concession.

<sup>582</sup> Williams (1962a).

<sup>583</sup> *Ibid.* at p 595. (Williams was here quoting Henry Joy, 1844.)

<sup>584</sup> Williams (1962a), pp 595, 596.

<sup>585</sup> Williams (1962b), p 664.

<sup>586</sup> In New Zealand, Young noted that errors in judge’s summings-up on corroboration resulted in a disturbing number of mistrials in rape cases (1983, p 141). In England, too, there have been frequent cases in which there was ample corroborating evidence but because the judge failed to administer the warning the conviction had to be quashed (Cross and Tapper (1985), p 222). Similarly, it has been



Not only did sexual offence complainants appear to be viewed with greater circumspection than accomplices but it seems that children, too, were considered to be more reliable. This perspective is implicit in the Criminal Law Revision Committee's statement that "children are often very observant and, *at least in non-sexual cases*, often give very good evidence".<sup>587</sup> Further, the warning was abandoned in respect of their evidence a full six years ahead of its abolition vis a vis accomplices and sexual offence complainants. McEwan says that the move "presumably represent[ed] new faith in the credibility of child witnesses".<sup>588</sup> The fact that sexual assault complainants and accomplices were only accorded this same "new faith" some six years later evidences a much greater unwillingness to trust them. Indeed, Wells argues that what really brought down the last two categories of corroboration warning was, not any "realisation that women have been wrongly judged", but the growing concern over child sexual abuse.<sup>589</sup> She refers to the 1989 Pigot Report which argued that its proposals for assisting children to give evidence and thus convict more child abusers would have only limited effect unless the corroboration rule was dropped.<sup>590</sup> She argues that, in following this recommendation, it would have been untenable to drop the warning with regard to child sexual offence complainants only but to have retained it where the complainant was an adult and so it was dropped altogether.

### 3.3.2 *Empirical Evidence*

It has just been shown that sexual offence complainants were viewed with greater suspicion than the other witness-groups attracting the corroboration warning and, following from this, it can be seen that they were considered to be the most untrustworthy witness-group of all. If this level of suspicion were warranted, it could not be argued that sexual offence complainants were treated arbitrarily - at most, all that could be said is that they were subject to unique treatment. However, it is suggested that the greatest anomaly of the corroboration rule as it applied to sexual offence complainants was that the reason for it seems to have been no more than a deep-seated but ultimately unsupported suspicion of this witness-group.

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noted that such technical questions as "what is corroboration?" and "was the jury warned in the right terms?" are currently quite a fertile source of appeals (*loc. cit.*, p 237).

<sup>587</sup> Criminal Law Revision Committee (1972), para 208. (Emphasis added.)

<sup>588</sup> McEwan (1992), p 116.

<sup>589</sup> Wells (1990), p 1032.

As explained, the rationale behind the corroboration warning was the presumed unreliability of the witness-groups attracting it. This proposition has been debated with regard to the three relevant witness-groups. With regard to children, for example, there has been a lobby of opinion arguing that they are equally as reliable as adults.<sup>591</sup> However, there is also a considerable body of evidence pointing to the contrary.<sup>592</sup> Dennis takes the stance that the case for the relative unreliability of children as reporters is unproven.<sup>593</sup> McEwan, on the other hand, argues that children *are* in a significantly different position from that of other witnesses. She argues that not only have they comparatively underdeveloped cognitive abilities, but they are, in sexual abuse cases, subject to a process of suggestion and repeated interrogation in a way no other potential victims are likely to be.<sup>594</sup> Again, with regard to accomplices, the justification for the warning has been questioned. Dennis, for example, says that it is a serious thing to say that accomplices are presumptive liars unless the jury is satisfied otherwise.<sup>595</sup> However, he does say that it might just conceivably be defensible on the ground that they are persons willingly involved in a criminal act and are therefore of bad character.<sup>596</sup> There is, of course, the further argument that accomplices might well have interests of their own to serve in giving evidence against the accused.

Whilst it is perhaps possible to justify a greater mistrust of children and accomplices than of witnesses generally, to say that all female victims of sex crimes are perjurers or fantasists unless the jury is convinced otherwise is “truly extraordinary”.<sup>597</sup> In fact, there is a distinct lack of empirical evidence establishing a greater propensity in sexual offence complainants to make false allegations than witnesses in general. Research carried out by police forces in the United States, for example, has consistently shown a false reporting rate of two per cent or less for sexual offences, a

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<sup>590</sup> *Ibid.*

<sup>591</sup> Notably Spencer (1987).

<sup>592</sup> See research referred to by McEwan (1992), pp 117-124.

<sup>593</sup> Dennis (1984), p 330.

<sup>594</sup> McEwan (1992), p 130.

This is not, she says, to argue for the strictness of the *Baskerville* corroboration test (*loc. cit.*).

<sup>595</sup> Dennis (1984), p 326.

<sup>596</sup> *Ibid.*

<sup>597</sup> *Ibid.*



rate which is comparable with that for other crimes.<sup>598</sup> In England, Gregory and Lees found “no clear-cut cases of false allegations” in their London study and reported that the Branch Crown Prosecutor could recall no clear-cut examples of such in five years of CPS work.<sup>599</sup> In their Scottish study, Chambers and Millar found that, despite a certain amount of rhetoric from police officers about the frequency of false complaining, individual officers were unable to document many individual cases which fitted the category of false complaints.<sup>600</sup> Further, they learned from senior detectives that false reporting was not thought to be any more common in sexual assault complaints than in other types of violent crime.<sup>601</sup>

It seems, therefore, that no conclusive, factual evidence existed to justify the corroboration warning in sexual cases. In fact, many commentators argue that false complaints are probably *less* common in this context than in any other. The Pigot Commission, for example, acknowledging that false allegations are sometimes made, recommended abolishing the warning on the following grounds:

We know of no evidence whatever which suggests that this takes place on such a scale and in a way so calculated to successfully deceive the jury that a special measure designed to enhance the normal standard of proof is necessary. *On the contrary, all the evidence which we received suggests that the stress, trauma and public humiliation so often experienced by the victims of sexual offences in court, and the intimidation to which they are sometimes subjected out of court, deter many from testifying at all and certainly militate against the bringing of false evidence.*<sup>602</sup>

Similarly, Dennis refers to the notorious difficulty and embarrassment of pursuing a sexual offence complaint - the victim has to cope with the police, who may be unsympathetic, sceptical or even hostile; with the ordeal of going through the story in detail in examination-in-chief at the trial; finally with the distress and humiliation of cross-examination on the minutiae of the offence and sometimes on her past sexual history as well - and argues that these factors are surely a powerful disincentive to pressing any charges of rape and, in fact, have been said to produce gross under-

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<sup>598</sup> In 1979 *The New York Sex Crimes Analysis Survey* found a false reporting rate of two per cent. More recently, figures collected by the police in Portland, Oregon, showed a false reporting rate of 1.6 per cent, compared with 2.6 per cent for vehicle theft (Schafran (1993), p 1012).

<sup>599</sup> Gregory and Lees (1993), p 3.

<sup>600</sup> Chambers and Millar (1983), p 86.

<sup>601</sup> *Ibid.* at p 85.

<sup>602</sup> Pigot (1989), para 5.27. (Emphasis added.)

reporting of such offences.<sup>603</sup> It would be surprising if they did not filter out false claims also. Temkin, too, suggests that the many “disincentives” to prosecute which the system currently affords the victim of rape might be thought to be sufficient to deter false allegations.<sup>604</sup>

Temkin explains that, in fact, judges and writers grounded their mistrust of sexual offence complainants in “folkloric assumption”.<sup>605</sup> Similarly, the Law Commission attributed the justification for the warning in sexual cases to “oft-repeated assertion” as distinct from empirical evidence.<sup>606</sup> This can be seen from the fact that commentators referred elusively to “experience” demonstrating that juries were hoodwinked by false claims by complainants.<sup>607</sup> Dennis explains that documentation of this experience was not, however, impressive.<sup>608</sup> He describes how Glanville Williams based much of his argument that women had hidden sexual motivation to lie on only two cases discussed at length, neither of which involved offences coming under the warning.<sup>609</sup> Wigmore, he explains, took almost all of his examples of false complaints from one casebook and certain letters of early twentieth century psychiatrists.<sup>610</sup> Significantly, only one conviction is referred to and then only anecdotally.<sup>611</sup>

### 3.3.3 *The Final Insult*

In light of the distinct absence of empirical evidence to this effect, the presumption that sexual offence complainants were so inherently untrustworthy as to necessitate a corroboration warning is truly objectionable. That they were then viewed with greater circumspection than the other witnesses attracting the warning is insupportable. But perhaps the ultimate insult to sexual offence complainants in this regard were the rulings in *Bagshaw* and *Spencer*.<sup>612</sup>

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<sup>603</sup> Dennis (1984), p 327.

<sup>604</sup> Temkin (1982), p 417.

<sup>605</sup> *Ibid.*

<sup>606</sup> Law Commission (1990), p 57.

<sup>607</sup> Dennis (1984), p 329.

<sup>608</sup> *Ibid.*

<sup>609</sup> *Ibid.*

<sup>610</sup> *Ibid.*

<sup>611</sup> *Ibid.*

<sup>612</sup> [1984] 1 All ER 971 and [1987] AC 128, respectively.



Whilst declining to hold that mental patients should constitute a class of persons in respect of whom a corroboration warning should always be given, the Court of Appeal in *Bagshaw* took the view that

...patients detained in a special hospital after conviction for an offence or offences... may well fulfill to a very high degree the criteria which justify the requirement of the full warning in respect of witnesses within accepted categories. It seems to us that nothing short of the full warning that it is dangerous to convict on the uncorroborated evidence of the witness will suffice.<sup>613</sup>

It can be seen, then, that the Court of Appeal equated sexual offence complainants with witnesses of criminal character and severe mental abnormality. Moreover, by refusing to make such witnesses a whole new category under the corroboration rule, it effectively adjudged them to be more trustworthy as a class than those witnesses coming under the warning. As a result of *Bagshaw*, Dennis explains, women were treated less favourably by the law of evidence than mental patients, to whom a general corroboration requirement did not apply.<sup>614</sup> This stance is all the more incredible given that the major justification for mistrusting sexual offence complainants was their alleged disturbed mentality - one would then have expected witnesses with actual clinically diagnosed mental illnesses, particularly those disposed to hallucination and paranoia as in *Bagshaw*, to have encountered at least similar circumspection.

In the event, the House of Lords expressly overruled *Bagshaw* when it came to answer the following certified point of law in *Spencer*:

In a case where the evidence for the Crown is solely that of a witness who is not in one of the accepted categories of suspect witness, but who, by reason of his particular mental condition and criminal connection, fulfilled the same criteria, must the judge warn the jury that it is dangerous to convict on the uncorroborated evidence.<sup>615</sup>

Lord Ackner made it clear that there was to be no new category of mental patients, with respect to whose evidence a full corroboration warning was required. Rather, it was considered much more satisfactory to leave the trial judge to give the jury such cautionary directions as seem appropriate in the case of any individual whose evidence might be suspect. Following *Bagshaw*, Temkin admonished that “sexual assault victims currently keep company with children, accomplices to crime, severely

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<sup>613</sup>[1984] 1 All ER 971 at 977.

<sup>614</sup>Dennis (1984), p 326.

disordered criminals prone to delusion and paranoia and persons of admittedly bad character".<sup>616</sup> However, the *Spencer* ruling was clearly more damning for it established that sexual assault complainants were, in fact, not fit to keep company with mentally disordered criminals.

### *Summary*

The practice of issuing a corroboration warning against the testimony of sexual offence complainants represented a clear departure from the conduct of trials generally. It caused complainants a great deal of humiliation and, moreover, was responsible for inhibiting significantly the prosecution and conviction of sex offenders.<sup>617</sup> Certainly, sexual offence complainants were not the only witness-group to merit this peculiar treatment. However, because the warning had to be given against every sexual offence complainant, prosecution and conviction rates for an entire class of related offences were negatively affected.<sup>618</sup> In the case of children and accomplices, on the other hand, the warning cut across disparate cases. In addition, the attitude of mistrust which gave rise to the warning was clearly strongest in respect of complainants in sexual cases. It will be shown that dispensing with the mandatory warning has not spelt the end of this cultural mistrust for it continues to pervade the criminal justice system, negatively affecting the experience of rape complainants at all stages of the judicial process.<sup>619</sup> And, it is suggested, this continued prejudice may well sustain the use of the corroboration warning in sexual offence cases.

### **3.4     *The Accused's Bad Character***

One of the clearest statements of the rule governing the admissibility of evidence of the accused's bad character is provided in *Makin v Attorney-General for New South Wales*:

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<sup>615</sup> [1987] AC 128 at 142 (per Lord Ackner).

<sup>616</sup> Temkin (1987), p 137.

<sup>617</sup> See, for example, Dennis (1984); Temkin (1987); Pigot (1989); Birch (1990); Birch (1995).

<sup>618</sup> This did not include the sexual procurement offences which, until the 1994 reform, required actual corroboration. In addition, in *Chance* [1988] QB 932, the Court of Appeal held that the warning did not have to be given in cases where the fact of the sexual abuse was not in dispute but the only defence relied upon was that of mistaken identity. Whilst this decision was welcome in that it removed the acute anomaly presented by warning the jury of the danger of relying on the complainant's uncorroborated testimony of sexual assault even when the fact of the assault was conceded by both the prosecution and the defence it should be noted that it left untouched the assumption upon which the complainant rule was based that such evidence is prone to fabrication.

<sup>619</sup> See Chapter Four, section 4.4.



It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence tends to show the commission of other crimes does not render it inadmissible if it bears upon the issue whether the acts alleged to constitute the crime are designed or accidental, or to rebut a defence which would otherwise be open to the accused.<sup>620</sup>

In this famous passage, Lord Herschell stated a fundamental rule of English criminal law, namely that the prosecution may not use the accused's previous bad character to suggest to the jury that he acted in conformity therewith in relation to the offence charged, or in other words that an accused of known bad character is more likely to have committed the offence charged, simply by reason of his previous character.<sup>621</sup> This is the overriding rule even where the evidence is *prima facie* relevant to an issue before the jury.

In this way, defendants are placed on a substantially different footing to witnesses in general who *are* liable to attack on their character.<sup>622</sup> Defendants are treated differently because it is recognised that information about their bad character may have little probative worth and yet go on to form the basis of their conviction because of its prejudicial impact on the fact-finding tribunal. As Murphy points out, if guilt could be proved by past record in this way, the defence of an innocent person of previous bad character would become difficult, if not impossible.<sup>623</sup> This, in turn, would seriously compromise some of the most immutable propositions of Anglo-American criminal justice, namely the presumption of innocence and the requirement that the prosecution prove the case against the accused beyond a reasonable doubt and without his or her assistance (to enable the defendant's past record to go to prove the case against him or her would obviously go some considerable way towards relieving the prosecution of the full extent of their burden).<sup>624</sup>

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<sup>620</sup> [1894] AC 57 at 65.

<sup>621</sup> Murphy (1995), pp 117, 118.

<sup>622</sup> However, adduction of the bad character of witnesses and complainants is not an unfettered exercise for, as shown in section 3.2 above, such attack is ostensibly restricted by the requirement that the questions asked and the information sought be relevant to either the witness' credibility or a fact in issue.

<sup>623</sup> Murphy (1995), p 118.

<sup>624</sup> However, McEwan says that other countries espousing the presumption of innocence do not place similar restrictions on the introduction of the accused's previous record (1992, p 55).

### 3.4.1 *Exceptions to the General Rule*

Also contained in Lord Herschell's dictum is the proposition that the accused's bad character *may* be admitted in certain situations. The position is that the mere fact that the evidence to be adduced tends to show extraneous misconduct does not render it inadmissible *if* it is relevant to a fact in issue for a purpose other than showing that the defendant acted in conformity with his character on the occasion in question.<sup>625</sup> Of the situations in which evidence of the defendant's prior misconduct may be adduced, section 1(f)(ii) of the Criminal Evidence Act 1898 is most pertinent to the evaluation undertaken in this thesis.

#### 3.4.1.1 *Section 1(f)(ii) of the Criminal Evidence Act 1898*<sup>626</sup>

Before the Criminal Evidence Act 1898 came into effect, the accused in a criminal case was not a competent witness in his own defence. Section 1 of the Act rendered him competent (though not compellable) as a witness for the defence at every stage of the proceedings. Murphy explains that, in the absence of further provision, this would have meant that the accused, like any other witness, would be open to attacks on his credit by cross-examination as to his character.<sup>627</sup> However, because of the risk of prejudice peculiarly associated with character in criminal cases, Parliament gave the accused a substantial, albeit not unlimited, protection against such an attack, in the no doubt justified belief that the right to give evidence might otherwise be rarely exercised.<sup>628</sup>

This protection exists in the form of section 1(f) of the Criminal Evidence Act - a complete code regulating the cross-examination of an accused who gives evidence. This code is such that it provides the accused with what is usually referred to as a 'shield' in respect of the introduction of evidence of extraneous offences and bad character. Section 1(f) provides as follows:

A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character...

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<sup>625</sup> Murphy (1995), p 118.

<sup>626</sup> The Northern Ireland equivalent is section 1(f)(ii) of the Criminal Evidence Act (NI) 1923 as amended by the Criminal Evidence (NI) Order 1988.

<sup>627</sup> Murphy (1995), p 129.

<sup>628</sup> *Ibid.*



Section 1(f) therefore provides a prohibition on four types of question - those tending to show previous *charges*, those tending to show previous *offences*, those tending to show previous *convictions* and those tending to show *bad character*. However, this shield may be lost in any of the circumstances envisaged by subsections (i), (ii), or (iii) and, if this happens, the accused becomes liable to be cross-examined about the matters otherwise prohibited. It should be noted that evidence of bad character adduced under section 1(f)(i) is to go to the issue of the defendant's guilt, whilst evidence adduced under 1(f)(ii) and (iii) is to go only to the issue of the defendant's credit.

We are here concerned only with section 1(f)(ii) or, more specifically, the second limb of this subsection which shall be referred to hereafter as section 1(f)(ii)b. According to section 1(f)(ii)b, the accused will lose the shield provided by section 1(f) if

...the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or the deceased victim of the alleged crime...

This particular exception to the shield is very frequently encountered in practice. It has a significant impact on the way in which the accused conducts his defence. As with the rest of section 1(f), this subsection applies only to those defendants who do not exercise their right of silence for if an accused person does not testify he can run a defence which involves imputations on the witnesses for the prosecution without fear of his bad character being revealed.

The leading authority for section 1(f)(ii)b is *Selvey v DPP*.<sup>629</sup> Here, the House of Lords confirmed that invocation of this limb is based on a "tit for tat" principle:

If the accused is seeking to cast discredit on the prosecution, then the prosecution should be allowed to do likewise ... so that the jury may judge fairly between them instead of being in the dark as to one of them.<sup>630</sup>

It was also pointed out that the court always retains a discretion to disallow cross-examination under this limb even though it may technically apply. Further, the statutory wording should be interpreted literally so that it will not avail the accused to say that no imputation on character was intended or expressed (as opposed to implied)

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<sup>629</sup> [1970] AC 304.

<sup>630</sup> *Ibid.* (per Lord Pearce).

or that insofar as there was an imputation it was true. Therefore, the shield may be thrown away even by an imputation which is, legally and tactically, an essential ingredient of the defence. However, the Lords did recognise one important qualification to the principle of literal interpretation and this is that the section does not apply where the accused is simply denying the offence alleged against him by the prosecution, albeit in emphatic language. Nevertheless, the upshot of the relevant caselaw is that an accused person having a record of convictions or a discreditable past would not advisedly ask questions whose effect was to cast imputations on the prosecutor for to do so might expose him to the risk that (if he himself gave sworn evidence) his own past might be disclosed to the jury.<sup>631</sup> In fact, McEwan says that the manner in which the courts have interpreted the words ‘involve imputations on the character’ is “inexcusable”.<sup>632</sup> This is because, she says, whilst the rhetoric of the adversarial tradition is that the accused has the right to defend himself, the application of section 1(f)(ii)b is such as to make this a risky business.<sup>633</sup>

### 3.4.2 Section 1(f)(ii)b and Rape Cases

Rape cases represent a sole exception to the general rule laid down by section 1(f)(ii)b. The two authorities usually cited as giving rise to this exception are *Sheean* and *Turner*.<sup>634</sup> In *Sheean*, the defendant gave evidence that the complainant had consented to the alleged act of intercourse. Prosecuting counsel there and then sought leave to cross-examine the accused as to his past on the basis that the latter had impugned the character of the prosecutrix. However, Jelf J held that the proposed cross-examination was not allowable because no imputation within the meaning of the statutory exception had been cast. In other words, the mere allegation of consent to an incident forming part of the *res gestae* was not taken as an imputation and the accused, therefore, retained his shield. Jelf J added, however, that if the accused “goes out of his way to make an attack upon the prosecutrix, based on matters outside the substance of the charge upon which he is being tried, it is otherwise”.<sup>635</sup>

<sup>631</sup> For a review of the relevant caselaw, see McEwan (1992), pp 158-163.

<sup>632</sup> *Ibid.* at p 161.

<sup>633</sup> *Ibid.*

<sup>634</sup> (1908) 21 Cox CC 561 and [1944] 1 KB 463, respectively.

<sup>635</sup> (1908) 21 Cox CC 561 at 562.



In *Turner*, in laying the foundation for a defence of consent, the accused alleged that the complainant both consented to the act of intercourse and made an offer manually to masturbate him. The trial judge formed the view that the allegation about masturbation was an insinuation that the prosecutrix was a “grossly indecent” woman and he allowed cross-examination of the accused as to a prior sexual assault on a female.<sup>636</sup> The subsequent conviction was overturned on appeal although not on the ground that no imputation had been cast. Rather, the view was that there had been an imputation but that it simply did not take away the accused’s shield. *Turner* has, therefore, been taken to have placed rape trials on a special footing.

McNamara explains that the effect of the authorities on this question is that the defendant in a rape case is entitled to lead all available evidence relevant to the issues, including consent, notwithstanding that the evidence might cast a grave slur on the character of the complainant and show her to be a woman of low moral character, without exposing himself to the risk that his shield will be taken away in the course of his own cross-examination.<sup>637</sup> Therefore, whereas in a non-rape trial an allegation essential to a defence (apart from a mere denial of the Crown case) may amount to an imputation sufficient to cast aside the shield (subject to the court’s discretion), in a trial for rape, no allegation which is a necessary ingredient of the defence of consent or belief in it can, as a matter of law, amount to a sufficient imputation for this purpose.<sup>638</sup> And, Temkin warns, this situation is likely to worsen in view of the Court of Appeal’s willingness to regard the complainant’s past sexual conduct as relevant to consent.<sup>639</sup> The more the courts persist in regarding sexual history as relevant to consent on the facts of the case, she explains, the less likely it will be that defendants in rape cases will have their own background revealed.<sup>640</sup>

The traditional explanation offered in support of this state of affairs is that because consent is an issue raised by the prosecution, in putting forward the defence of consent, the accused is merely denying the Crown case. Seabrook and Sprack explain

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<sup>636</sup> [1944] 1 KB 463 at 465.

Today, it might be far-fetched to hold that such an allegation amounted to an imputation but Murphy points out that the evaluation of ‘imputations’ should be made “in the light of current public opinion” (1995, p 134).

<sup>637</sup> McNamara (1981), p 30.

<sup>638</sup> *Ibid.* at pp 30, 31.

<sup>639</sup> Temkin (1993), p 17.

that it is now well established that the first imputation on character in a criminal case is made by the prosecution when they charge the accused with the offence and so when the accused denies the charge (albeit in emphatic language) he is simply “firing the second shot”.<sup>641</sup> The same principle, they say, applies in rape cases when the accused raises the defence of consent even though this defence normally involves at least an implied attack on the character of the complainant.<sup>642</sup> Indeed, arguably the exception did begin as a justifiable departure from the general rule under s1(f)(ii)b. However, although it was initially restricted to allegations of consent involved in the accused’s version of the *res gestae*, once created, the exception has become virtually unconfined in practice.<sup>643</sup> As Zelling J noted in *Gun; Ex Parte Stephenson*, judicial interpretation of the exception has led to an “almost unlimited ferreting into the girl’s past and attack on her character by direct question, by innuendo, and regrettably sometimes by smear”.<sup>644</sup> Similarly, Adler noted that the exception gave the defence “a virtually unconstrained licence to sling sexual mud”.<sup>645</sup> The Heilbron Committee, too, observed that it has been widely interpreted in favour of the accused so that defence counsel can go to considerable lengths with no risk of letting the accused’s record in.<sup>646</sup>

### Summary

The operation of section 1(f)(ii)b of the Criminal Evidence Act 1898 demonstrates that, once again, the normal rules of evidence are abandoned in the context of the rape trial. The development of the law in this area has meant that rape complainants are denied the protection against abusive cross-examination that is afforded victims in all other situations. The fact that section 1(f)(ii)b does not apply where the imputations cast go to the issue of consent takes on even greater significance in light of the type of evidence most commonly adduced to prove this defence - sexual history evidence. It was shown in section 3.2 above that introducing evidence of their sexual life causes rape victims singular distress and humiliation. Defence counsel, therefore, enjoy unique latitude with which to ‘break’ complainants in rape cases. Therefore, whilst

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<sup>640</sup> *Ibid.*

<sup>641</sup> Seabrooke and Sprack (1996), p 51.

<sup>642</sup> *Ibid.*

<sup>643</sup> McNamara (1981), p 32.

<sup>644</sup> (1977) 17 SASR 165 at 173.

<sup>645</sup> Adler (1982), p 666.

<sup>646</sup> Heilbron Committee (1975), paras 127-128.



victims as a whole suffer cruel cross-examination ordeals, the most objectionable questioning takes place in rape trials. Ironically, however, it is in these very cases that the victim is denied the protection traditionally afforded by section 1(f)(ii)b and there can be no doubt that defence counsel exploit this anomalous state of affairs as far as possible. The further consequence of the differential application of section 1(f)(ii)b in rape cases is that, whilst the jury is presented with a very negative picture of the complainant, they are “kept in the dark” as to the bad character of the accused. Thus, in clear contradiction of Lord Pearce’s dictum in *Selvey*, the jury in a trial for rape is prevented from judging “fairly” between the prosecution and the accused.<sup>647</sup>

### 3.5 Conclusion

As explained, the purpose of this thesis is to formulate effective and feasible suggestions for improving the experience of rape victims within the criminal justice system. To this end, it is sought to delineate clearly the types of problems facing this victim-group and, crucially, to determine the source of these problems. Chapters One and Two provided such an insight with regard to three specific features of the rape victim’s treatment at court. This present chapter has sought to complete this overview by examining three further aspects of their trial experience, namely, the use of sexual history evidence, the corroboration warning and the operation of section 1(f)(ii)b of the Criminal Evidence Act 1898. Following the comparative approach adopted in Chapter One, this present chapter not only outlined how these evidential rules operate in the context of the rape trial but also examined how they equate with the conduct of criminal trials generally. Critically, whilst Chapter One discovered that rape and non-rape victims have a great deal in common in terms of how they are treated, the operation of these evidential rules evince a distinct margin of difference between their courtroom experiences.

The fact that the objectionable treatment outlined in this present chapter does not occur in non-rape trials is crucial to understanding just why rape victims are made to suffer in this way. This is because the singularity of this treatment strongly suggests that it is attributable to prejudicial attitudes towards this victim-group. The following chapter aims to establish whether this is so.

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<sup>647</sup> *Selvey v DPP* [1970] AC 304.

## *Chapter Four*

### *Cultural Defects*

#### *4.1 Introduction*

[T]he very concepts of “neutrality” and “rationality” to which the courts adhere are infused by male ideologies. Nowhere is this more apparent than in rape trials... masculinity stands revealed in their procedures and judgments.<sup>648</sup>

The central proposition of this thesis is that if the rape victim’s experience within the criminal justice system is to be sufficiently improved, then it is imperative that the factors shaping this experience are properly understood for it is these which any reform measures must aim to address. Such an understanding has already been achieved with regard to the specific problems outlined in Chapter One above. Thus, the cruel nature of cross-examination and the joint inadequacies of prosecuting counsel and judiciary were shown to be rooted in the structural and functional features of the Anglo-American criminal justice system.<sup>649</sup> Because they derive in this way from the inherent characteristics of our legal system, these problems affect all victims equally. Accordingly, as shown in Chapter One, rape and non-rape victims have a great deal in common in terms of their negative courtroom experiences. However, Chapter Three of this thesis revealed that rape victims are subject also to a number of highly singular trial practices which render their courtroom ordeal much more traumatic than that experienced by victims generally. It is now intended to establish why rape victims are singled out for differential treatment.

The previous chapter revealed that, whilst they heighten considerably the rape victim’s courtroom trauma and, moreover, greatly inhibit conviction rates for this crime, there really is no practical justification for the peculiar rules of evidence which apply in a trial for rape. With regard to the routine adduction of sexual history evidence, there is simply no general probative link between chastity and the issues of consent or credibility. As for the corroboration warning requirement, there is no evidence that rape complainants are less trustworthy than witnesses generally. In fact,

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<sup>648</sup> Lees (1989b), p 14.

<sup>649</sup> See Chapter Two above.



false complaints are much less likely in this type of case than any other given the stress, trauma and public humiliation so often experienced by the victims of sexual offences in court. Finally, there is no reason that rape cases should form an exception to section 1(f)(ii)b of the Criminal Evidence Act 1898. Or, at the least, there is no reason why they should form the only exception.<sup>650</sup>

In the absence of any practical justification, this present chapter explores the possibility that the dominant role played by men throughout the criminal justice system - from the formulation of laws through to their interpretation and application - is responsible for the arbitrary treatment accorded rape victims.<sup>651</sup> There are a number of interrelated reasons for this proposition. First of all, because men are dominant it is their interests, values and perspectives which pervade the criminal process, significantly influencing matters therein. Secondly, this male dominance has inescapable misogynist undertones which similarly permeate the system and exert considerable influence. Finally, because of this male sovereignty, the perspective of females is almost entirely excluded. The undesirability of this single gender domination is most evident in rape cases. This is because rape is a unique crime in that it involves predominantly the victimisation of members of one gender group (women) by members of the other (men). Therefore, whilst it is an area of almost exclusive female concern, it is nevertheless men who formulate, interpret and apply the law of rape and, in so doing, import wholesale masculine preconceptions and interests. This results, ultimately, in an overwhelming bias towards the male defendant and against the female complainant. This bias is evident in the attitude of officials for, whilst there seems to be a distinct failure to understand the crime of rape from the perspective of the female victim, there is a clear empathy with the male offender. Selfe and Burke explain that there is an “over-understanding” of the defendant’s view which leads to a readiness to “explain”, “rationalise” and even “excuse” his conduct.<sup>652</sup> This bias towards the male defendant is manifest not only in

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<sup>650</sup> McNamara questions why the exception has not been extended to other crimes where consent would be a defence or to crimes of a sexual nature (such as buggery, sexual assault and carnal knowledge) where consent would not be a defence (1981, p 31).

<sup>651</sup> Indeed, Patullo argues that the overwhelmingly male legal profession affects the lives of *all* women who come into contact with it, whether as lawyers, defendants, or victims (1983).

<sup>652</sup> Selfe and Burke (1998), p 56.

Selfe and Burke explain that this over-understanding” is evidenced by the wide range of commonly held ‘explanations’ for the defendant’s actions - they had both been drinking, he’s never done it before,

the attitude of officials but also in the law of rape itself, in terms of the legal definition *per se*, procedure, and evidence.<sup>653</sup>

The way in which masculinity defines the law of rape and the subsequent impact of this on the treatment of rape victims and the handling of their complaint will now be examined.

## 4.2 *Origin of the Law of Rape*

To a considerable extent, prohibitions on force against women have functioned to protect men. Historically, rape has been perceived as a threat to male as well as female interests; it has devalued wives and daughters and jeopardised patrilineal systems of inheritance.<sup>654</sup>

Perhaps the greatest anomaly of the law of rape is that it originated, not from a desire to protect women from sexual abuse by men, but to protect male property rights. Mitra explains that the essence of the crime was theft of another man's property.<sup>655</sup> This is clear from the fact that redress for the crime lay in financial compensation to be paid, not to the victim, but to her rightful *owner*, be it her father or her husband.<sup>656</sup> In fact, even in the thirteenth century, when penal sanctions for rape were supposed to have supplanted pecuniary compensation, these were virtually never carried out in practice - financial compensation continued to be paid and judges colluded in this practice.<sup>657</sup> Temkin says that this confirms how entrenched was the view that it was primarily an *economic* loss which was sustained when a rape took place.<sup>658</sup>

Reinforcing this idea of women as male property is the fact that the measure of damages awarded for rape varied according to an estimation of the woman's *worth* in men's eyes. This worth was attached primarily to her chastity so that the rape of a virgin incurred harsher penalties than the rape of an 'unchaste' woman. Thus, it was

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she led him on, etc. - culminating, *in extremis*, in judicial statements at sentencing about the 'contributory negligence' of the victim (*loc. cit.*).

<sup>653</sup> Selfe and Burke (1998), p 53.

<sup>654</sup> Rhode (1989), p 244.

<sup>655</sup> Mitra (1979), p 560.

<sup>656</sup> Los (1990), pp 160, 161.

<sup>657</sup> Temkin (1982), p 400.

<sup>658</sup> *Ibid.*



considered that a chaste woman had undergone greater devaluation as a consequence of being raped. Loh explains that this was because her “marketability” to men would have been diminished by the “despoiling” and the institutions of marriage and family consequently threatened.<sup>659</sup> To protect these institutions, he explains, rape was criminalised and chastity thus became a legally protected property value.<sup>660</sup> A further determinant of the value of women was their social status. Therefore, whilst rape of a propertied virgin could result in castration or death, assaults against nuns, wives, or widows received lesser penalties.<sup>661</sup> Since a woman’s status was to a considerable extent derivative, the vindication of her injury often depended on her relationship to men. So, for example, rape of a nobleman’s serving maid cost twelve shillings; rape of a commoner’s maid only five.<sup>662</sup>

LeGrand argues that rape laws *continue* to have the manifest function of protecting male property interests. She explains that they “bolster, and in turn are bolstered by, a masculine pride in the exclusive possession of a sexual object”, protecting the male from any decrease in the ‘value’ of his sexual ‘possession’, which results from forcible violation.<sup>663</sup> And there is evidence to suggest that official reactions to rape continue to depend on assessments of the woman’s property value. Chastity, for example, continues to serve as a highly influential variable in this value appraisal with officials reacting less severely to defendants accused of raping women with ‘bad’ sexual reputations. Berger says that a notion of “it doesn’t matter since she wasn’t a virgin” permeates the culture of the criminal justice system.<sup>664</sup> Clark and Lewis found that there was a similar tendency to be less punitive where the victim was of lower socio-economic status.<sup>665</sup> Further, LaFree found that the race of the victim is decisive with officials reacting less punitively to defendants accused of raping black women.<sup>666</sup> Similarly, Rhode describes how in the United States, rapes of black women by white men were often discreetly overlooked, while black men accused of raping white women ran the risk of show trials, disproportionate sanctions, and lynch mobs.<sup>667</sup>

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<sup>659</sup> Loh (1980), p 563.

<sup>660</sup> *Ibid.*

<sup>661</sup> Rhode (1989), p 245.

<sup>662</sup> *Ibid.*

<sup>663</sup> LeGrand (1973), pp 924, 925.

<sup>664</sup> Berger (1977), p 25.

<sup>665</sup> Clark and Lewis (1977).

<sup>666</sup> LaFree (1980).

<sup>667</sup> Rhode (1989), p 245.

Therefore, between 1945 and 1965, she reports, a death sentence was eighteen times more likely for convicted black rapists with white victims than for any other racial combination.<sup>668</sup>

The fact that rape laws were conceived not for the protection of women but to safeguard male property rights illustrates the dominance of men and, further, the influence of misogyny within this area of the law. The substantive law of rape reinforces this perception of women as property and the corollary notion that their 'value' is linked inextricably to their chastity.

### 4.3 *The Substantive Law of Rape*

Given the fact that legal language, the legislature and the judiciary have traditionally been men's domain, it can be safely assumed that the process of the legal construction of rape has been shaped by ideological and cultural perceptions and assumptions that are shared by men rather than by both men and women.<sup>669</sup>

Just as rape laws originated for the protection of male interests, so too the substantive law of rape evidences the dominance of masculine perceptions and concerns.<sup>670</sup> This can be seen in two ways. First of all, by the restriction of the rape offence to an act of penile penetration and, secondly, by the marital rape exemption.<sup>671</sup>

#### 4.3.1 *Penile Penetration*

Because it allows only penile penetration of the vagina or anus to constitute rape, the legal definition of this crime is criticised as being too narrow. LeGrand, for example, argues that since the offence actually consists of a sexual outrage to the person, that

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<sup>668</sup> *Ibid.* at p 246.

<sup>669</sup> Los (1990), p 160.

<sup>670</sup> The legal definition of rape is provided by section 1 of the Sexual Offences Act 1956, as amended by section 142 of the Criminal Justice and Public Order Act 1994. Thus,

...a man commits rape if (a) he has sexual intercourse (whether anal or vaginal) with a person who does not consent to it; and (b) at that time he knows that he or she does not consent to it or is reckless as to whether he or she consents to it.

In Northern Ireland, the current definition of rape is to be found in article 3(1) of the Sexual Offences (NI) Order 1978. This definition is identical to its English counterpart except in one major respect. This is that, whilst the English definition of rape has been extended to encompass anal as well as vaginal penetration, thus rendering it a gender-neutral crime in terms of the victim, in Northern Ireland, rape remains gender-specific in terms both of the perpetrator and the victim.

<sup>671</sup> This exemption was revoked by the House of Lords in *R V R* [1992] 1 AC 599. This decision was given statutory effect by section 142 of the Criminal Justice and Public Order Act 1994 which removed the word 'unlawful' from its redefinition of rape. In the Northern Ireland context, the word 'unlawful'



outrage should probably include a broader range of sexual contact.<sup>672</sup> Thus, it is considered that a better definition would encompass such forms of serious sexual coercion as digital penetration, penetration by inanimate objects, forced oral sex, etc.<sup>673</sup> Currently, these activities are collectively subsumed under the heading of indecent assault, a classification which covers other much less serious activities also.

Crimes classified as indecent assault attract lesser penalties than the rape offence - whilst the maximum sentence for rape is life imprisonment, it is only ten years in the case of indecent assault. In fact, until 1985, the maximum sentence for indecent assault against a woman was only two years imprisonment but, where the victim was a man, a ten-year sentence was available. Consequently, O'Doherty explains, a degrading sexual attack on a woman where the defendant forced her to commit fellatio or inserted objects into her body was not even an arrestable offence as this required a maximum penalty of five years imprisonment.<sup>674</sup> The sexual abuse of men, on the other hand, was evidently taken much more seriously and this, it is suggested, was reflective of the general misogyny of the criminal law.

Section 3(3) of the Sexual Offences Act 1985 brought parity of sentencing to this area of the law. O'Doherty says that, finally, it seemed that the seriousness of indecent assault on females was appreciated.<sup>675</sup> Further, he considers that the general attitude towards the crime of indecent assault has improved:

Indecent assault has at last passed from being viewed as a minor offence, particularly where women are concerned, to one where the sentencing powers available can more closely reflect the nature of any sexual assault short of rape.<sup>676</sup>

Other commentators argue, however, that the sentencing powers available in no way match the seriousness of some of the forms of sexual abuse which are currently classified as indecent assault. Edwards, for example, says that the presumption is that indecent assault is trivial in consequence and so the forcible insertion of broom-

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has yet to be removed from the legal definition of rape even though the exemption has been abolished here also.

<sup>672</sup> LeGrand (1973), p 941.

<sup>673</sup> In the Republic of Ireland, section 4 of the Criminal Law (Rape) (Amendment) Act 1990 provides that rape encompasses penetration of the vagina or mouth by the penis, or penetration of the vagina by any object held or manipulated by another person.

<sup>674</sup> O'Doherty (1998), p 679.

<sup>675</sup> *Ibid.*

<sup>676</sup> *Ibid.* at p 680.

handles, knives, bottles into the anus or vagina of women, as an indecent assault, has been rendered less serious than rape.<sup>677</sup> Hence, it is argued that the definition of rape ought to be widened to cover these other serious forms of sexual violence.

Penile penetration of the anus or vagina attracts the most punitive response because it is considered to be the ultimate sexual violation. However, it must be asked just whose perspective this represents? From the point of view of those who have actually suffered the particular assault, is an act of forcible penetration by a bottle, for example, really less serious than forcible penetration by the accused's penis? Lees found that, in fact, many women find these other forms of sexual coercion to be just as humiliating as penile penetration.<sup>678</sup> There is also the increased likelihood of injury where the victim is penetrated by an inanimate object. Nevertheless, the law continues to view penile penetration as the worst form of sexual abuse. In this way, it fails to take properly into account the experience and perspective of the actual victims of sexual crime. The fact that anal penetration was not incorporated into the definition of rape until 1994 may be seen as a further indication of this. Indeed, it might be said that this change came about more in response to the growing problem of male rape than out of acknowledgment of the gravity of such an act from the perspective of female victims.<sup>679</sup>

It is suggested that the legal definition of rape reflects *male* perspectives for it is men who believe that the ultimate sexual violation of a woman is penetration by the male sexual organ.<sup>680</sup> In this regard, Selfe and Burke argue that the definition of rape is a product of the "male-fixated view of rape as being restricted to one form of intercourse".<sup>681</sup> The substantive law of rape is based, therefore, not on the experience and feelings of the actual victims of this crime, but on male perceptions of what constitutes the maximum sexual violation of women. Therefore, as Los argues, the

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<sup>677</sup> Edwards (1996), p 323.

<sup>678</sup> Lees (1996), p xvi.

<sup>679</sup> The number of reported cases of coercive buggery of males rose from 516 in 1982 to 1255 in 1992 and indecent assault on males rose from 2082 to 3119 cases (*The Times*, 12/7/94). According to Gillespie, Home Office figures for 1984-1989 indicate that offences of buggery increased by ninety per cent and indecent assault of boys by twenty-four per cent (1996, p 152).

<sup>680</sup> Los (1990), p 162.

<sup>681</sup> Selfe and Burke (1998), p 62.



normative message from the law of rape is that “women’s sexuality is complementary to and defined by men’s sexuality”.<sup>682</sup>

Going further, the restriction of rape to an act of penile penetration evinces not only male perspectives, but also male interests. As explained, the criminalisation of rape came about in order to protect male property rights. Thus, women were conceived of as belonging to men and their ‘value’ in this regard was linked inextricably to their chastity. This is clearly evidenced by the fact that very early rape laws sanctioned only the rape of virgins.<sup>683</sup> Therefore, in 1244, Thurkleby J disallowed a widow’s appeal of rape because “a woman can only appeal concerning rape of her virginity”.<sup>684</sup> Given this preoccupation with chastity, it was necessary to formulate the substantive law of rape in terms which would sanction the specific activity which diminished this sexual value - sexual intercourse (penile penetration). Los explains that this can be tied in with the overriding concern to protect the patriarchal basis of marriage:

[T]he possibility that a woman might conceive a child outside marriage was viewed as more important than her own definition of sexual violence, which could include forced oral sexual acts, penetration with objects and so forth.<sup>685</sup>

The continued insistence, despite the gravity of other acts of sexual coercion against women, that only penile penetration can constitute the offence of rape illustrates that the modern law of rape functions primarily to serve male interests, that it espouses the view that women are property, and that it is similarly fixated with female chastity.

#### 4.3.2 *Marital Rape Exemption*

Until 1992, another constituent element of the legal definition of rape was that it be “unlawful”. Unlawful here means outside marriage. Therefore, non-consensual sexual intercourse which took place within marriage could not constitute rape. Temkin explains that this exemption can be traced to the early law’s exclusive concern with the protection of virginity.<sup>686</sup> She says that in medieval times, the normal presumption of the courts was that any history or implication of consent on the part of the woman was a valid defence to an appeal of rape.<sup>687</sup> In this way, wives would find no redress when they had been raped by *any* man, least of all their

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<sup>682</sup> Los (1990), p 162.

<sup>683</sup> Temkin (1987), p 26.

<sup>684</sup> P.R.O. Just. 1/175, m. 44d.

<sup>685</sup> Los (1990), p 161.

<sup>686</sup> Temkin (1987), p 43.

<sup>687</sup> *Ibid.*

husband. When, in 1275, the Statutes of Westminster ostensibly extended the law of rape to cover all women, not merely virgins, there was still nothing to suggest that a man could be liable for raping a woman with whom he had previously had consensual sexual intercourse.<sup>688</sup> Further, in 1279, a defendant was acquitted of rape because “he was betrothed to the complainant before he lay with her”.<sup>689</sup> Thus, betrothal appeared to have carried with it a presumption of consent.

The eighteenth century writings of Sir Matthew Hale may be seen to have made explicit the marital rape exemption. Hale took the view that a concubine could withdraw her consent by withdrawing from cohabitation.<sup>690</sup> It followed from this that women who had prior consensual sexual relations with a man could be protected if on a subsequent occasion she refused consent and he raped her. However, it was Hale’s opinion that a wife should be treated differently and he justified the marital rape exemption in the following terms:

The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife has given up herself in this kind unto her husband, which she cannot retract.<sup>691</sup>

This statement was invoked throughout the decades to preclude the conviction of husbands for having forcible sex with their wives.

The twentieth century, however, saw some inroads being made into this ancient common law doctrine. Thus, in *Clarke*, a husband was found guilty of raping his wife where she had obtained a separation order containing a non-cohabitation clause from the magistrate’s court.<sup>692</sup> However, the exemption itself was upheld and Hale’s rationale invoked. In addition, no suggestion was made that consent could be revoked otherwise than by a court order. Therefore, in *Miller*, the court refused to accept that by petitioning for divorce a wife had revoked her consent.<sup>693</sup> It was held that “an act of the parties or... an act of the courts” was necessary to revoke consent, and it was suggested that an agreement to separate, particularly if it included a non-molestation

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<sup>688</sup> *Ibid.* at p 44.

<sup>689</sup> *Ibid.*

<sup>690</sup> Hale (1736), pp 628, 629.

<sup>691</sup> *Ibid.* at p 629.

<sup>692</sup> [1949] 2 All ER 448.

<sup>693</sup> [1954] 2 QB 282.



clause, would suffice.<sup>694</sup> Similarly, in *O'Brien*, the court held that a *decree nisi* of divorce would revoke a wife's implied consent to marital intercourse.<sup>695</sup> In *Roberts*, the Court of Appeal held that consent had on the facts been terminated where there was a formal deed of separation, even though this lacked both a non-cohabitation and a non-molestation clause.<sup>696</sup>

The marital rape exemption was finally revoked in 1992 by the House of Lords in *R v R*.<sup>697</sup> In this case, the wife had moved out of the matrimonial home the previous October, and had gone to live with her parents. The defendant had broken into his wife's parents' house a month later and attacked her. He was sentenced to three years for attempted rape and eighteen months for assault occasioning actual bodily harm. This was the first case in which a husband was accused of rape where there was no legal separation or court order prohibiting him from molesting his wife. The Court of Appeal upheld the conviction and, in so doing, overturned 250 years of legal immunity for wife rapists.<sup>698</sup> Lord Lane said that the decision did not create a new offence but "remov[ed] a common law fiction which has become anachronistic and offensive".<sup>699</sup> The House of Lords also upheld the decision and emphasised that Hale's statement no longer represented the law and that the time had arrived "when the law should declare that a rapist remains a rapist and is subject to the criminal law, irrespective of his relationship with his victim".<sup>700</sup> This revocation of the marital rape immunity was integrated into statute in June 1994 when section 142 of the Criminal Justice and Public Order Act removed the word 'unlawful' from its redefinition of rape.

The exemption of husbands from the rape sanction illustrates again the proposition that rape laws were formulated and function, not for the protection of women, but to serve male interests. Temkin says that, given man's greater physical strength and woman's consequent vulnerability, the overriding objective of the law of rape should be to protect sexual choice, that is to say, a woman's right to choose whether, when

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<sup>694</sup> *Ibid.* at 290.

<sup>695</sup> [1974] 3 All ER 663 at 664.

<sup>696</sup> [1986] CLR 188.

<sup>697</sup> [1992] 1 AC 599.

<sup>698</sup> Lees (1997), p 117.

<sup>699</sup> (1991) 2 All ER 257 at 266.

<sup>700</sup> (1991) 3 WLR 767 at 770.

and with whom to have sexual intercourse.<sup>701</sup> The marital rape exemption suggests, however, that this is not the primary objective of the law of rape. Similarly, LeGrand points out that if rape laws were designed to protect women, the exception would simply make no sense for, whilst there are “conceptual difficulties” involved in making rape a crime between husband and wife, if a woman suffers no less pain, humiliation, or fear from forcible sexual penetration by her husband than by a relative, a boyfriend, or a stranger, the difference is not great enough to warrant the total insulation of the former but not the latter from legal sanction.<sup>702</sup> In fact, Russell’s research revealed that marital rape is one of the more upsetting kinds of rape.<sup>703</sup>

It is, therefore, of no benefit to women to exclude wives from the protection of the law of rape. The marital rape immunity does, however, clearly serve men for, in keeping with the perception of women as chattel, it prevents the curtailment of a husband’s property rights over his wife and, in turn, protects the patriarchal basis of marriage.<sup>704</sup> As Brownmiller says, the idea that a husband could be prosecuted for raping his wife was unthinkable given that the law was conceived to protect his interests, not those of his wife.<sup>705</sup> The fact that the exemption was abolished only in 1992 illustrates that this misogynist perception of women as male property has almost completely survived the twentieth century. Indeed, Lees says that it continues to prevail for, whilst the change in judicial opinion reflected in *R v R* is significant, it is not reflected in sentencing policy.<sup>706</sup> Rather, the vestiges of patriarchal rights lead judges to take the view that marital rape is less serious than rape by a stranger or acquaintance on the grounds that a husband has certain sexual rights over his wife.<sup>707</sup>

The penile penetration element of the legal definition of rape and the marital rape exemption evince the present suggestion that despite being an area of almost exclusive female concern, it is men who dominate the law of rape and in so doing misconstrue and, indeed, subjugate the needs of this victim-group.

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<sup>701</sup> Temkin (1982), pp 400, 401.

<sup>702</sup> LeGrand (1973), pp 925, 926.

<sup>703</sup> Russell (1982), pp 191, 192.

<sup>704</sup> Los (1990), p 161.

<sup>705</sup> Brownmiller (1976), p 380.

<sup>706</sup> Lees (1997), p 120.

<sup>707</sup> *Ibid.*



#### 4.4 *Applying the Law of Rape*

[R]ape laws are not designed, nor do they function, to protect a woman's interest in physical integrity. Indeed, rather than protecting women, the rape laws might actually be a disability for them, since they reinforce traditional attitudes about social and sexual mores.<sup>708</sup>

As explained, the purpose of this present chapter is to illustrate how the dominance of men throughout the legal system shapes the treatment of rape victims therein. It has already been shown that it was in order to protect male interests that rape laws were conceived in the first place. In keeping with this, the substantive law of rape is formulated in terms which reflect male perspectives and best facilitate male objectives. However, nowhere is the fact that men are dominant more in evidence than in the interpretation and application of the law of rape. Many of the formal and informal practices adhered to in this regard derive from misogynist assumptions about women and rape. Of these, the two most influential are the interrelated 'real' rape and 'lying woman' myths. The following discussion demonstrates that these myths underlie the arbitrary evidential rules outlined in Chapter Three above and are also responsible for other unacceptable practices during the processing of rape cases.

##### 4.4.1. *The Lying Woman Myth*

No myth is more powerful in the tradition of rape law than the myth of the lying woman: the spurned lover who seeks revenge; the deflowered virgin who refuses to assume responsibility for her sexual activities; the vicious and spiteful woman who would lie about a rape charge.<sup>709</sup>

The belief that women frequently make false allegations of rape pervades the criminal justice system. It can be traced back to medieval times when a presumption existed against relying on the testimony of a woman bringing an appeal of rape. She had to prove that while the offence was recent she had raised the 'hue and cry' in neighbouring towns, and shown her injury and clothing to men. An alleged failure to do so could be raised as a defence by the appellee. The Law Commission tells us that

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<sup>708</sup> LeGrand (1973), p 919.

<sup>709</sup> Estrich (1992), p 11.

reference to this requirement was made as long ago as Bracton's *De Corona*, circa 1267.<sup>710</sup> Hale provided the most succinct expression of the need to be wary of rape complainants:

It must be remembered that it (the allegation of rape) is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent.<sup>711</sup>

This infamous warning evidences the dual concern that not only are false rape charges frequently made but they are also more likely to evade exposure than unwarranted accusations made in other contexts.

The previous chapter revealed that this mistrust is essentially groundless - there is no empirical evidence to show that false rape allegations are more prevalent than any other and, indeed, the greater likelihood is that false complaints are much rarer in this case-type.<sup>712</sup> Nevertheless, rape victims continue to be viewed with deep distrust, giving rise to much of the singularity of the law of rape.<sup>713</sup> A major illustration in this regard is the mandatory corroboration warning. This highly anomalous practice was discussed in detail in the previous chapter wherein it was shown to involve essentially a judicial invitation to the jury to accept that the majority of rape complainants are liars and to then decide on the facts whether the particular complainant before them was such a liar.<sup>714</sup>

The corroboration warning represented the law's formal espousal of the lying woman myth. However, its profound influence may be seen informally also and at all stages of the criminal process. For example, research evidences a strong culture of mistrust at police level. Take the following guidelines which were issued to assist police officers in the 'interrogation' of rape complainants:

It should be borne in mind that except in the case of a very young child, the offence of rape is extremely unlikely to have been committed against a woman who does not immediately show signs of extreme violence. If a woman walks into a police station and complains of rape with no such signs of violence she must be closely interrogated. Allow her to make her statement to a policewoman and then drive a horse and cart through it. It is always advisable if there is any doubt of the

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<sup>710</sup> Law Commission (1990), p 88.

<sup>711</sup> Hale (1736), p 635.

<sup>712</sup> Chapter Three, section 3.3.

<sup>713</sup> Berger (1977), p 10.



truthfulness of her statement to call her an outright liar... Watch out for the girl who is pregnant or late getting home one night; such persons are notorious for alleging rape or indecent assault. Do not give her sympathy.<sup>715</sup>

Similarly, in their Scottish study, Chambers and Millar found that the general orientation of police officers to be sceptical “seems to manifest itself more strongly in relation to sexual assault complainants”.<sup>716</sup> They point out that training manuals used by the Scottish police give “repeated warnings about false complaining and place a major emphasis on the credibility of the complainer”.<sup>717</sup> Chambers and Millar noted that an important aspect of this underlying sceptical attitude was the “unsupported assumption” that women make false complaints either maliciously, or to cover up for their “indiscretions”.<sup>718</sup> This expectation of untruthfulness led to “a firm attitude in order to establish the complainant’s credibility” and was seen to “justify increased vigilance and scrupulousness on the part of the detectives in examining the woman’s story”.<sup>719</sup> In 1999, even after the abolition of the mandatory corroboration warning, it seems that little has changed. Temkin found that “disbelieving and stereotypical attitudes about women who report rape persist”.<sup>720</sup> Harris and Grace similarly report that police attitudes to rape have not changed significantly.<sup>721</sup>

The strength and pervasiveness of the lying woman myth evinces a major distinction between the treatment accorded rape and non-rape victims. That is, whilst it was shown in Chapter One that all victims are subject to discrediting tactics, the depiction of rape complainants as liars is more than just a tactic; it is a reflection of the cultural mistrust of this witness-group. Since this mistrust is essentially unwarranted, it must be asked just where has it come from and how has it acquired doctrinal status? It is here suggested that it is purely and simply a misogynistic creation, developed and perpetuated by the overwhelmingly male criminal justice profession. This can be seen most clearly from the corroboration warning requirement. For example, until 1982, Canadian law expressly required that the warning be given only in the case of

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<sup>714</sup> Chapter Three, section 3.3.

<sup>715</sup> Firth (1975).

<sup>716</sup> Chambers and Millar (1983), p 83.

<sup>717</sup> *Ibid.* at p 84.

<sup>718</sup> *Ibid.* at p 94.

<sup>719</sup> *Ibid.* at pp 94, 85.

<sup>720</sup> Temkin (1999), p 38.

<sup>721</sup> Harris and Grace (1999), pp 11-24.

female sexual offence complainants.<sup>722</sup> In the British context, whilst *Gammon* (1959) 43 Crim App Rep 155 stipulated that the warning had to be given irrespective of whether the complainant was male or female, debates about the need for the warning and the actual warning itself were almost always expressed in terms of *female* “(un)qualities”.<sup>723</sup> Indeed, even in *Gammon* it was said:

We who have had long experience of these cases know that the evidence of a *girl* giving evidence of indecency by a man is notoriously unreliable, and you look in those cases for some other evidence making it more likely that her story is true. *It does not apply nearly as much in the case of boys.*<sup>724</sup>

Regardless of its form, the warning discriminated against women in practice for the majority of sexual offence complainants (and all rape complainants) were female.<sup>725</sup>

It is clear that the profound mistrust of sexual offence complainants is inextricably linked to the female gender and, in the absence of any practical justification, it is clearly the product of misogyny. As to why such suspicion should be generated, it is suggested that the answer lies again in the inherently patriarchal nature of our criminal justice system. That is, this environment of male supremacy may have resulted in an unwillingness to believe the word of a mere woman over that of a man. In this regard, McEwan says that a rape complaint may be perceived as “an inconvenient and unseemly slur” so that women should anticipate a cautious and sceptical reaction from the criminal justice system before it assists them.<sup>726</sup> There is the further possibility that this male dominated environment has bred an inability to understand rape from the victim’s perspective and that this ignorance has transmuted into suspicion. A final suggestion is that the myth was consciously propagated to ensure that rape laws do not deviate too far from their original purpose as a means of assisting *men*. That is, whilst they were formulated to prevent the devaluation of women as male property, rape laws represent a threat to men by their obvious potential to sanction wholesale male sexual activity. By its proposition that rape complainants are as a class liars, the lying woman myth works to reduce considerably the effectiveness of the law of rape as a challenge to male sexual activity.

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<sup>722</sup> Boyle (1984), pp 155-157.

<sup>723</sup> Wells (1990), p 1032; Temkin (1987), p 136.

<sup>724</sup> (1959) 43 Crim App Rep 155 at 159. (Emphasis added.)

<sup>725</sup> Wells (1990), p 1032.

<sup>726</sup> McEwan (1992), p 103.



#### 4.4.2 *The 'Real' Rape Myth*

While the sexual offence of rape formally penalises men, it is also clear that the way the offence is enforced actually reinforces male rights of domination over women. By focusing on rape as a crime committed by strangers who are deviant, the reality of interpersonal male violence that rape actually entails is obscured.<sup>727</sup>

The 'real' rape myth comprises the belief that rape occurs only according to a very specific set of conditions. Adler has described this 'real' rape as rape where the victim is sexually inexperienced and has a "respectable" lifestyle, whose assailant is a stranger and whose company she had not willingly found herself in. She will have been subjected to a brutal attack, fought back, been physically hurt and, afterwards, in a state of hysteria, promptly reported the offence.<sup>728</sup> This set of rape circumstances is variously referred to as 'real', 'ideal', 'classic' or 'blitz' rape. Kelly and Radford describe it as the "Bad Wolf attacking Little Red Riding-Hood" scenario.<sup>729</sup>

Research reveals that the majority of rapes do not conform to this stereotype.<sup>730</sup> The 'real' rape concept is, therefore, a major fallacy. Nevertheless, it has a hugely influential impact on the processing of rape complaints at every stage of the criminal justice process.<sup>731</sup> For example, Chambers and Millar found that it featured heavily in police evaluation of complainant veracity.<sup>732</sup> More recently, Harris and Grace confirmed its heavy influence on police decision-making.<sup>733</sup> Bohmer found that judges, too, rely on the 'real' rape myth in evaluating the credibility of complainants, referring to those who conformed to the stereotype as "genuine victims".<sup>734</sup> Sentencing practices also reflect the influence of this myth.<sup>735</sup> Juries are similarly influenced. Loh, for example, observed that although local community attitudes may

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<sup>727</sup> Lacey, Wells and Meure (1990), p 317.

<sup>728</sup> Adler (1987), pp 119-120.

<sup>729</sup> Kelly and Radford (1987), p 247.

<sup>730</sup> Amir (1971); Legrand (1973); Smith (1989); Grace, Lloyd and Smith (1992); Home Office Research and Statistics Department (1995); Lees (1996); Harris and Grace (1999).

<sup>731</sup> See, for example, Lee (1971); Feldman-Summers and Palmer (1980); Chambers and Millar (1983); Williams (1984); Adler (1987); Lloyd and Walmsley (1989); Smith (1989); Grace, Lloyd and Smith (1992); Gregory and Lees (1993); Harris and Grace (1999).

<sup>732</sup> Chambers and Millar (1983), pp 87-89.

<sup>733</sup> Harris and Grace (1999), pp 11-24.

<sup>734</sup> Bohmer (1974), pp 304, 305.

<sup>735</sup> See, for example, Wright (1984); Chambers and Millar (1986); Lloyd and Walmsley (1989) and Rook and Ward (1993).

insist on aggressive rape prosecution, at the same time, their representatives on the jury tend not to convict except in the most compelling of circumstances.<sup>736</sup>

Ultimately, the degree of fit between any alleged rape to the 'ideal' rape scenario has a profound effect on the chances that a complainant will see her attacker convicted.<sup>737</sup> In this regard, Rhode accuses the system of "a pronounced sexual schizophrenia" whereby one form of abuse - intercourse achieved through physical force against a chaste woman by a stranger - has been treated as the archetypal antisocial crime, attracting severe (sometimes draconian) penalties.<sup>738</sup> By contrast, coercive sex that has departed from this paradigm frequently has been denied or discounted.<sup>739</sup> The 'real' rape myth determines conviction rates in this way because complaints which do not conform to this stereotype are much less likely to be believed at any stage of the attrition process.<sup>740</sup> In this way, the 'real' rape myth and that of the lying woman are closely interrelated. That is, the main proposition of the former is that there is only one kind of *genuine* rape situation. Therefore, women complaining of rape in other circumstances must be telling lies. Put another way, the presumption involved in the lying woman myth that rape complainants are liars tends only to be rebutted if the particular case fits the 'real' rape scenario. And, because only the minority of rape complaints so conform, the *majority* of rape complainants are seen to be lying. All in all, Berger says, it is small wonder that the law in this area has taken its highly singular turns, transmuting the system's presumption of innocence from a procedural protection into a virtual immunity from conviction.<sup>741</sup>

As explained, the 'real' rape scenario accounts for only the minority of rapes. Therefore, it must be asked just why it is so heavily relied upon in the processing of rape complaints? Returning to the historical origin of the law of rape as an offence

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<sup>736</sup> Loh (1980), p 581.

See also the large body of research which reveals the negative reaction of juries to complainants who do not conform to the sexually 'respectable' rape victim ideal, for example, Kalven and Zeisel (1966); Catton (1975); Bordiga and White (1978); La Free, Reskin and Vischer (1985); Adler (1987) and Brown, Burman and Jamieson (1993).

<sup>737</sup> Adler (1987), pp 119, 120. (In Adler's study only thirty-three per cent of incidents not matching the real rape stereotype resulted in conviction compared with seventy-two per cent of those incidents that did.)

<sup>738</sup> Rhode (1989), p 245.

<sup>739</sup> *Ibid.*

<sup>740</sup> It also works by enabling defence counsel to depict the complainant as blameable (see Chapter One, section 1.2.1.2).



designed to protect male property interests, the failure of the criminal justice system to assist rape victims not conforming to the 'ideal' victim stereotype can perhaps partially be explained. Since women's value to men arose historically from their chastity, unchaste women were of significantly less value. Therefore, the defilement of an unchaste woman merited little or no retribution. In its implicit proposition that only 'respectable' women are 'rapeable', the 'real' rape myth supports this perception. And, even though contemporary social mores dictate that very few women today are 'chaste' in accordance with this antiquated view, the continued reliance on the 'real' rape myth indicates that the perception that unchaste women are of lesser value still permeates the culture of the legal system.

Further, by demonising the rape of virginal women by sexual psychopaths, the 'real' rape myth ensures that the law of rape does not depart from its original role as a means of assisting *men*. That is, whilst they were formulated to protect male property rights, rape laws represent a threat to men by their obvious potential to sanction their sexual behaviour. This is because the legal definition of rape does not stipulate that the victim must be a virgin or that the offender a sex-crazed psychopath. Rather, the substantive law of rape has really quite a broad latitude for finding men guilty. This is as it should be for, in contrast with the 'real' rape stereotype, the real "locus of violence against women rests squarely in the middle of what our culture defines as 'normal' interaction between men and women".<sup>742</sup> However, to acknowledge this would be to leave *all* men open to the law's curtailment and this would, of course, run counter to the implicit purpose of the rape sanction - the protection of male interests. Therefore, in order to ensure that rape laws do not enable majority male interests to be displaced in favour of those of the crime's actual victims, the 'real' rape myth, with its insistence on the least occurring rape scenario as being the only genuine rape, is propagated. The fact that the system continues to rely heavily on this myth at all stages of the process despite its proven inaccuracy, supports this assertion that it is a misrepresentation which has been purposefully introduced and perpetuated by those in authority in order to prevent the wholesale sanctioning of male sexual activity.

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<sup>741</sup> Berger (1977), p 22.

<sup>742</sup> Johnson (1980), p 146.

The 'real' rape and 'lying woman' myths are inexorably intertwined. These and other misogynist beliefs form the backbone of the law of rape, influencing both formally and informally the treatment of rape complainants at every stage of the criminal process. Ultimately, they reduce considerably its effectiveness as a potential sanction on the sexual abuse of women. This can be seen most clearly by examining their influence on the determination of the consent issue.

#### 4.5 *Consent*

Legal standards reflect male views and judgements on male interaction; when female actors become involved, these male standards are used to judge the conduct of women... The law of rape particularly demonstrates the phenomenon of judging circumstances by male standards.<sup>743</sup>

Rape is a unique crime. It comprises an act which is perfectly legal *per se* but which is made criminal because of the state of mind of the parties to it. That is, in order to prove rape, the prosecution must show that the accused had sexual intercourse with the complainant and that this intercourse took place without her consent. Further, it must be shown that the accused knew or suspected that she was not consenting.<sup>744</sup> The defendant's honest, even if unreasonable, belief that she was consenting will constitute a defence.<sup>745</sup>

Consent is, therefore, a crucial element of the offence of rape and it is raised as a defence in the majority of contested rape cases.<sup>746</sup> However, the way in which this issue comes to be determined underscores the dominance of masculine ideology within the law of rape. This is because it is male attitudes towards women, sex and rape which determine whether or not a particular complainant consented. Basically, an incident is rape only if *men* perceive it as such.<sup>747</sup> Otherwise, it is normal consensual intercourse. This makes a nonsense of the consent element for whilst the criminality of rape centres around the non-consent of the victim, it is precisely her experience which is disqualified. The ways in which misogynist ideology displaces

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<sup>743</sup> Murphy (1992), pp 277, 278.

<sup>744</sup> *Satnam* (1983) 78 Crim App Rep 147 clarified the point that *objective* recklessness on the part of the defendant will not satisfy the *mens rea* of rape.

<sup>745</sup> *Morgan* [1975] 2 All ER 347.

<sup>746</sup> McNamara (1981), p 27, note 11.



the rape victim's experience in determining the subjective issue of consent will now be examined.

#### 4.5.1 *The 'Real' Rape Myth*

When the relationship, degree of intimacy, and interaction between victim and assailant are raised as relevant issues in courtroom cross-examination, determining consent from non-consent is interpreted from patriarchal standards. When this happens, the female's experience of violation is disqualified, since male hegemonic ideology is institutionalised or built into the very structure of the legal system and the law.<sup>748</sup>

Whilst it was shown in Chapter One that all complainants stand to be contrasted with an 'ideal' victim stereotype, the 'real' rape myth may be seen to set rape cases quite apart. This is because it is a much more powerful stereotype and this is evidenced by the fact that aspects of it are formally incorporated into the law of rape. The 'independent observation' rule is one indication of this, the doctrine of recent complaint another.<sup>749</sup> Ultimately, the 'real' rape myth is used as an official blueprint for determining whether a particular complainant consented or not - if its various ingredients are absent, an incident is likely to be classified, not as rape, but as consensual sexual intercourse.

##### 4.5.1.1 *Injury*

The legal definition of rape stipulates only that there be lack of consent. It does not require the offender to have used force on the complainant or to have threatened such. In *Olugboja*, the Court of Appeal emphasised that neither force nor the threat of it is necessary to prove lack of consent.<sup>750</sup> Nor, it was held, is mere submission to be equated with consent - consent involves submission, but submission does not necessarily involve consent.

Despite the substantive law's clear position on this issue, the 'real' rape myth has caused a concept of 'force', over and above the coercion implicit in the act of rape

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<sup>747</sup> MacKinnon (1989), p 180.

<sup>748</sup> Matoesian (1993), p 16.

<sup>749</sup> See sections 4.5.1.3. and 4.5.1.4 below.

itself, to be injected informally into the offence. This is because the ‘real’ rape myth presupposes that all rapists are psychopaths who carry out frenzied and brutal attacks which indubitably leave their victims visibly injured. It also presumes that women cannot be made to have sexual intercourse against their will unless extreme force is used. In this way, the presence or absence of injury is highly influential in determining whether or not the complainant consented. Chambers and Millar, for example, found that most complainants in their study were examined and cross-examined in detail about the extent of the injuries which they suffered.<sup>751</sup> They found that prosecutors were keen to introduce evidence of injury in order to show lack of consent and from the defence’s point of view, lack of visible injuries were certainly taken as indicative of consent.<sup>752</sup> Lees similarly found that “judge and counsel almost always demand physical evidence of force or violence if they are to convict”.<sup>753</sup>

Using injury as a means of determining consent may well be of benefit to those victims who have suffered such. However, many victims do not suffer visible injury. This does not mean that they have not been raped. Using injury as a determinant of the consent issue reflects not the experience of rape victims but, rather, male perceptions of this crime. First of all, men believe that ‘real’ rapists are psychopathic and brutal. The reality, on the other hand, is that rapists are generally ‘normal’ men. Secondly, men believe that rape can only be achieved through force. Again, the reality is quite different with offenders using other forms of coercion to achieve their objective. As Atkins and Hoggett explain, force is a male threat which men fear; there are many other less explicit ways in which men can cause women to fear them.<sup>754</sup>

#### 4.5.1.2. *Resistance*

The substantive law of rape does not require the victim to have resisted her attacker. However, once again, the ‘real’ rape myth may be seen to have put a “gloss” on the non-consent element, shifting the focus from the woman’s subjective state of mind, as

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<sup>750</sup> [1982] QB 320.

<sup>751</sup> Chambers and Millar (1986), p 96.

<sup>752</sup> *Ibid.* at p 97.

<sup>753</sup> Lees (1989a), p 10.

<sup>754</sup> Atkins and Hoggett (1984), p 69.



affected by the man's actions, to her behaviour in response.<sup>755</sup> Chambers and Millar, for example, found that it was sometimes implied that a 'real' victim would have resisted fully even if this meant being badly injured or that she should have tried to escape from her attacker rather than suffer the dishonour of a sexual attack.<sup>756</sup> They report that the women in their study were asked whether they had shouted or screamed at the time of the attack. In fact, they were questioned on the precise details of what they had screamed.<sup>757</sup> Defence counsel tried in this way to distinguish between screaming/crying in order to repel the attacker or to call for help and screaming/crying as the result of embarrassment at being discovered engaging in consensual sex.<sup>758</sup> Similarly, they report that it was suggested that the screaming/crying was part of a cover-up to explain the situation to others.<sup>759</sup> In this way, victims are put in a double bind - lack of verbal resistance is used to show consent whilst the presence of verbal resistance may be used to feed into the myth that women make false allegations for reasons such as shame and regret at having indulged in consensual sex.

With regard to *physical* resistance, Chambers and Millar found that complainants were questioned more on what they had *not* done than on what they had done.<sup>760</sup> Thus, where the complainant had failed to offer any resistance, even where there were apparently understandable reasons, she was cross-examined in depth about this.<sup>761</sup> Chambers and Millar report that the defence made much of this in order to convince the jury that the woman had in fact consented.<sup>762</sup> Even when the complainant had offered physical resistance, the defence often attempted to suggest that she had not resisted sufficiently to convince the attacker of her lack of consent.<sup>763</sup> Alternatively, her actions were often belittled by suggestions that a different method of resistance might have been more effective.<sup>764</sup>

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<sup>755</sup> Berger (1977), p 8.

<sup>756</sup> Chambers and Millar (1986), p 100.

<sup>757</sup> *Ibid.* at p 98.

<sup>758</sup> *Ibid.*

<sup>759</sup> *Ibid.* at pp 99.

<sup>760</sup> *Ibid.* at p 100.

<sup>761</sup> *Ibid.* at pp 100, 102.

<sup>762</sup> *Ibid.* at p 102.

<sup>763</sup> *Ibid.*

<sup>764</sup> *Ibid.*

The resistance requirement evidences once again the displacement of the victim's experience of rape by how men perceive this crime. It ignores the fact that many women are too frightened to do anything other than submit to the rape. As Lees points out, brutal sex murders do occur and provoke massive media coverage. Therefore, a woman's fear for her life, or of being seriously injured, is not unreasonable.<sup>765</sup> Moreover, where victims do physically resist, they are much more likely to sustain serious injuries. In fact, to physically resist is incompatible with advice given to women by police forces in the US. That advice, which is substantiated by research on sex offences, is that passive resistance and attempts to appeal to or reason with the assailant are probably safer and as effective as counter attacks which may provoke further violence.<sup>766</sup> Rhode states that the resistance requirement places women in "a perverse dilemma" for they are practically required by the law to struggle with their attacker despite the fact that in so doing they are more likely to suffer physical injury or even death.<sup>767</sup>

It is only in the context of rape that victims are required to resist their attacker. By contrast, Berger explains, in a crime like robbery, also a "non-consensual and forcible version of an ordinary human interaction," the law imposes no burden of opposition: it simply inquires whether the accused took something from another person by violence or intimidation.<sup>768</sup> Yurchesyn *et al* similarly remark that, whilst robbery victims are told by others that they did the right thing to avoid injury by not resisting, women who are sexually assaulted face both the social and legal expectation that they should have resisted to the point of risking injury.<sup>769</sup> Thus, rape victims are required to satisfy a much stricter burden of proof than any other type of victim.

#### 4.5.1.3 *The Hysterical Complainant*

According to the 'real' rape myth, a genuine rape victim will be in extreme, visible distress after the attack. This element of the 'real' rape concept has been formally incorporated into the law of rape by the 'independent observation' rule which provides that where a complainant's distress has been independently observed and

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<sup>765</sup> Lees (1989a), p 11.

<sup>766</sup> Howard League (1984).

<sup>767</sup> Rhode (1989), p 247.

<sup>768</sup> Berger (1977), p 8.

<sup>769</sup> Yurchesyn, Keith and Renner (1992), p 82.



appears to the court to have been genuine and unfeigned, it may amount to corroboration of her evidence.<sup>770</sup> This rule deviates from the normal position on corroboration which is that for evidence to be properly corroborative it must be independent of the source requiring to be corroborated.<sup>771</sup> Whilst sexual offence complainants appear in this way to have an advantage over other witnesses, the fact is that the independent observation rule operates simply to rebut the usual inference of untruthfulness in rape cases.

Distress not independently observed cannot serve as corroboration. In *Redpath*, Lord Parker CJ explained that where the distress is, for example, no more than part and parcel of a recent complaint made by a girl to her mother, the jury should be directed to attach little or no weight to it.<sup>772</sup> This is simply in keeping with the general rule that for evidence to be properly corroborative, it must be independent of the source requiring to be corroborated. However, it seems that in explaining to juries why this type of distress may not amount to corroboration, judges are casting a different slant on the matter. For example, in a case tried at the Old Bailey, Judge Smedley directed the jury as follows:

A word of warning. If the account the complainant is giving was completely fabricated, you may think she is clever, then clever enough to act out distress.<sup>773</sup>

Thus, the fact that the complainant's distress could not serve as corroboration was not explained in the standard terms that it lacked independence but, rather, it was pointedly suggested that it might have been feigned. This is bound to have had a prejudicial impact on the jury's reception of the complainant's evidence as a whole, particularly since the corroboration warning requirement was still in force at that time.

Lees argues that the issue of distress presents a difficult paradox for rape victims for, whilst only independently observed distress can be corroborative of their allegation, lack of distress is frequently used *against* them to corroborate, as it were, the defence case.<sup>774</sup> She observed that a "common defence tactic" is to use the complainant's lack

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<sup>770</sup> *Chauhan* [1981] 73 Crim App Rep 232; *Dowley* [1983] CLR 168.

<sup>771</sup> *Baskerville* [1916] 2 KB 658 at 667.

It seems that, in sexual cases, the requirement of independence is satisfied by applying it to the person who observes the complainant's distress and not to the distress itself.

<sup>772</sup> [1962] 46 Crim App Rep 319, 321. See also *Knight* [1966] 1 WLR 230.

<sup>773</sup> As seen in Lees (1996), p 120.

<sup>774</sup> *Ibid.* at p 119.

of visible distress to suggest that her reactions are not typical of a rape victim and that, therefore, she has not been raped.<sup>775</sup> However, research has revealed that there is no typical reaction to having been raped - some women express anxiety and hysteria immediately; for others the reaction may be delayed but is nevertheless every bit as traumatic.<sup>776</sup> That there is no prescribed reaction to being raped has been recognised by courts in the United States. There, the prosecution is permitted to introduce expert testimony on Rape Trauma Syndrome in cases where the alleged rapist suggests that the victim's conduct after the incident was inconsistent with her claim of rape.<sup>777</sup> It was explained in *Bledsoe* that the value of this type of evidence is that it may "disabus[e] the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths".<sup>778</sup> Lees demands that British judges also take on board the findings on Rape Trauma Syndrome, rather than "collud[ing] with the defence counsel's position" vis a vis these popular myths.<sup>779</sup>

#### 4.5.1.4 Recent Complaint

The 'real' rape myth further dictates that a 'genuine' rape victim would report her attack to the police immediately. Oliver Wendell Holmes J described this belief as "a perverted survival of the ancient requirement that a woman should make hue and cry as a preliminary to an appeal of rape".<sup>780</sup> Indeed, Blackstone tells us that there was a statute of limitations on rape cases in early times, which ran in the absence of a recent complaint and at one time had statutory force.<sup>781</sup> The recent complaint doctrine survives in modern law where, Murphy says, it "fits uneasily into the role of admissible evidence".<sup>782</sup> In fact, it has been formally incorporated into the law of rape by the rule that a sexual offence complainant may give evidence that at the earliest reasonable opportunity she voluntarily and without prompting reported the rape to a third party.<sup>783</sup> Alternatively, another witness may testify that the complainant reported the rape to him or her. This evidence is regarded as relevant to the complainant's

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<sup>775</sup> *Ibid.* at p 121.

<sup>776</sup> Holmstrom and Burgess (1978); Roberts (1989); Foley (1994).

<sup>777</sup> *Bledsoe* [1984] California Supreme Court.

<sup>778</sup> *Ibid.*

<sup>779</sup> Lees (1996), p 122.

<sup>780</sup> *Commonwealth v Cleary* [1898] 172 Mass 175.

<sup>781</sup> Blackstone (1973), p 211.

<sup>782</sup> Murphy (1995), p 453.

<sup>783</sup> *Osborne* [1905] 1 KB 551.



credibility since it indicates a consistency between her conduct and her evidence at the trial. Furthermore, where consent is in issue, it may be used to show that her conduct was not consistent with consent. However, the complaint may not be used as evidence that the events in question actually occurred or that the complainant's allegations are true.

The recent complaint doctrine exists as an exception to the general rule excluding evidence of previous consistent statements.<sup>784</sup> This gives the impression that something of a concession has been made to sexual offence complainants. On the contrary, however, the doctrine operates "to rebut the adverse inference that might otherwise be drawn from the victim's failure to complain of the attack upon her".<sup>785</sup> This is because rape complainants do not benefit from the presumption of truthfulness which exists in respect of witnesses to other crimes.<sup>786</sup> The exception can be seen, therefore, to be grounded in the usual misogynist folklore surrounding rape complainants.<sup>787</sup> Moreover, far from assisting rape complainants, the recent complaint rule often acts as an impediment to them. This is because whilst a prompt report is no longer a prerequisite for conviction, the absence of such is invariably used by the defence to suggest that the complainant was not raped but, for one reason or another, fabricated the charge against the accused. Adler, for example, observed that defence counsel may be relied upon to point out forcefully to the jury any delay in reporting.<sup>788</sup> Judges, too, comment adversely upon the matter in their summing-up to the jury.<sup>789</sup> The effect, Adler noted, was a significantly lower conviction rate in these cases.<sup>790</sup>

Using the promptness of a rape victim's complaint to assess her veracity is based on typically fallacious preconceptions as to what constitutes a genuine rape victim for, as Chambers and Millar found, it is not an obvious or normal reaction for many rape victims to report to the police immediately but, rather, many women decide to tell no

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<sup>784</sup> Although they may be admitted where they are part of the *res gestae* or where there is an allegation of recent invention (McColgan (1996), p 277).

<sup>785</sup> Tapper (1990), p 283.

<sup>786</sup> See, particularly, Chapter Three, section 3.3 above.

<sup>787</sup> Whilst originally confined to rape complainants, the recent complaint rule now applies in all sexual cases. However, where consent is not at issue, only the complainant is allowed to give evidence of the terms of the complaint (*Wallwork* (1958) 42 Crim App Rep 153).

<sup>788</sup> Adler (1987), p 119. See, also, Chambers and Millar (1986), pp 104-105.

<sup>789</sup> Temkin (1987), p 145; Adler (1987), p 119.

<sup>790</sup> Adler (1987), p 119.

one in an attempt to try to forget what has happened to them.<sup>791</sup> Temkin says that manipulation of the recent report rule reveals a total failure to understand the impact of the crime of rape on its victims, for many perfectly genuine rape victims do not tell a third party, either immediately or at all.<sup>792</sup> There are many reasons for this. For example, Chambers and Millar explain that the situation is particularly difficult for women who know their attacker either as a friend or as a relative, since a report to the police and subsequent involvement in the criminal justice system could cause major problems within a family.<sup>793</sup> Where the victim knows her attacker there is the further possibility that she is too afraid of repercussions to report the incident immediately. These considerations must be taken seriously given the fact that the majority of rapes are carried out by men known to their victims. The emphasis on the importance of recent complaint is, therefore, quite unjustified and it also represents yet another barrier to prosecution and conviction in rape cases.<sup>794</sup>

#### 4.5.1.5 The 'Respectable' Complainant

Perhaps the most influential aspect of the 'real' rape stereotype is the sexual 'respectability' or otherwise of the complainant.<sup>795</sup> Adler, for example, found that ninety-four per cent of defendants charged with raping sexually 'respectable' women were convicted.<sup>796</sup> Where the complainant's sexual reputation had been markedly discredited, on the other hand, the conviction rate was only forty-eight per cent.<sup>797</sup>

It was already shown in Chapter Three that sexual history evidence is routinely introduced in rape trials to go to the issue of consent.<sup>798</sup> However, also revealed in that chapter, was that much of such evidence bears no logical relationship to this issue. McColgan says that, in fact, the perceived relevance of sexual history evidence

<sup>791</sup> Chambers and Millar (1986), p 104.

<sup>792</sup> Temkin (1987), p 145.

<sup>793</sup> Chambers and Millar (1986), p 104.

<sup>794</sup> Temkin (1987), p 146.

<sup>795</sup> In addition to *sexual* respectability, Chambers and Millar found that complainants were also cross-examined about their general 'bad character' and about their living arrangements and general social activities in order to depict them as unrespectable (1986, pp 106-108, 111-113). They further observed that complainants were asked about contraceptive methods or about knowledge of sexual terms. This, they explain, was done in order to equate such knowledge with sexual experience or promiscuity (*loc. cit.* at p 109). In a similar vein, Lees found that even the act of explaining what the rapist did and how she responded is enough to render the complainant "unrespectable" (1989a, p 13).

<sup>796</sup> Adler (1987), p 101.

<sup>797</sup> *Ibid.*

<sup>798</sup> Chapter Three, section 3.2.



lies in its relationship with the ‘real’ rape myth.<sup>799</sup> She explains that introducing this type of evidence enables the defence to feed into anachronistic cultural assumptions about women and sex which lead, ultimately, to a shift in focus from the question of whether the complainant was raped, to the question of whether she is a ‘rapeable’ woman.<sup>800</sup> Women who indulge in non-marital sexual activity are not considered to be rapeable. LeGrand explains that this notion reflects the dichotomy between the “good” woman, who is the sole sexual possession of one male, and the “bad” woman who, lacking status as a sole possession, functions as the outlet for “normal” male promiscuity and therefore *cannot* be raped.<sup>801</sup> By depicting the ‘ideal’ rape victim as sexually inexperienced, the ‘real’ rape myth supports this proposition that ‘unrespectable’ women are not rapeable. This is, of course, completely unrealistic for even prostitutes are capable of being raped.

#### 4.5.2 *Reconstructing Rape*

The unequal status which women possess in society results in a situation in which what they have to say is for many purposes discounted or reinterpreted for them. So it is in the context of sex. Women who expressly state that they do not consent to sexual intercourse may nevertheless be deemed to consent to it... To justify a treatment of women which denies their autonomy, resort has been had to a ragbag of ideas about female and male sexuality, varying from the bogus to the irrelevant and culled formerly from medicine and latterly from psychoanalysis.<sup>802</sup>

The reconstruction or “normalisation” of rape into consensual sexual intercourse demonstrates further the way in which the experience of the actual victim is overruled by patriarchal ideology in the course of determining the issue of consent.<sup>803</sup> This reconstruction takes place by feeding into the worst excesses of misogynistic assumptions about heterosexual sexual relations.

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<sup>799</sup> McColgan (1996), p 276.

<sup>800</sup> *Ibid.* at p 287.

<sup>801</sup> LeGrand (1973), p 938.

<sup>802</sup> Temkin (1987), p 82.

<sup>803</sup> See, for example, Temkin (1987); Lees (1989a); Matoesian (1993); Edwards (1996); McColgan (1996).

A major assumption in this regard is that consensual intercourse incorporates a degree of violence and, certainly, “forcible persuasion”.<sup>804</sup> Matoesian explains that, because of the convergence between law and patriarchy, the legal system “enshrines male predatory sexual activity as the normal model of sexuality”.<sup>805</sup> Lees says that this enables violence during a sexual encounter to be somehow neutralised; it is not “real” violence because violence is part of sex. This means that even where the woman gives evidence of being violently assaulted or threatened, this does not necessarily preclude her consent. The defence will argue that only further violence, or her active resistance, is adequate proof of her non-consent.<sup>806</sup> Similarly, Edwards explains that even serious injury can be reconstructed within the sexual discourse of pain and pleasure, of masochism and sadism, rather than within the discourse of violence, domination and tyranny.<sup>807</sup>

Harris and Grace found evidence of this type of reasoning in police decision-making. They refer to one rape complainant who alleged that, as far as the police were concerned, blood which was found at the scene of the incident was indicative only of ‘rough sex’ having occurred.<sup>808</sup> At court, Chambers and Millar report that even where victims had suffered obvious injury, defence counsel would try to re-interpret these by suggesting that they had been “part of the lovemaking process”, or “an unusual form of sexual behaviour”.<sup>809</sup> In one such case, the victim had been punched in the face, strangled, bitten on the leg and then raped in front of the accused’s car and, in another case, she had been punched in the face, knocked to the ground, dragged by the hair over waste-ground into the bushes and kicked in the head before being raped.

Judges, too, are guilty of normalising sexual abuse into ordinary sex. For example, in a 1977 appeal case, Mr. Justice Slynn remarked:

It does not seem to me that the appellant is a criminal in the sense in which that word is used frequently in these courts. Clearly he is a man who, on the night in question, allowed his *enthusiasm for sex* to overcome his normal behaviour.

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<sup>804</sup> Lees (1989a), p 10.

<sup>805</sup> Matoesian (1993), p 17.

<sup>806</sup> Lees (1989a), pp 10, 11.

<sup>807</sup> Edwards (1996), p 331.

<sup>808</sup> Harris and Grace (1999), p 21.

<sup>809</sup> Chambers and Millar (1986), pp 96, 97.



The appellant's "enthusiasm for sex" had, in fact, involved an attack on a seventeen year-old barmaid whom he had met previously that evening in a park. When the girl refused to have sex, he kept on touching her, pulled at her clothes, and put his hand up her vagina (he was wearing rings), not just once but several times. On one occasion she had passed out with the pain. He also grabbed her round the ribs, bit her nipples and wrenched her earrings out. The doctor who examined her said that the extreme swelling of the vulva would have caused extreme pain which he had only seen in cases of recent childbirth. Again the injury was not consistent with normal intercourse and a great deal of force would have been necessary. Nevertheless, the appellant was told that he was an "asset" to the British army and that the best thing he could do to make amends was to go back to his unit and continue to serve his country.<sup>810</sup> His three year prison sentence was replaced by a six month suspended sentence.

A second major assumption is that women are ambivalent about sex. It is believed, for example, that they often do not mean it when they say "no". In fact, the "no" means "yes" school of thought represents one of the major underpinnings of rape trials. Take the following comment by Judge Dean at the Central Criminal Court at the Old Bailey:

As gentlemen of the jury will understand, when a woman says "no" she doesn't always mean "no".

Lees says that this attitude voices a common view which is used to support the argument that women do not share male rationality, in other words, their evidence is no evidence at all.<sup>811</sup> The implication is that if women do not know whether or not they want sex, then rape cannot happen as their will is always confused.<sup>812</sup> In this way, the concept of consent becomes irrelevant and the very definition of rape as sexual intercourse without consent is undermined.<sup>813</sup> This attitude further depicts women as coquettish creatures who indulge in sexual games-play with men. The implication from this is that women *want* men to override their objections. Podhoretz, for example, states that men must never take "no" for an answer at any stage in the

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<sup>810</sup> Per Lord Roskill.

<sup>811</sup> Lees (1997), p 76.

<sup>812</sup> *Ibid.*

<sup>813</sup> *Ibid.*

process of courtship.<sup>814</sup> This, he adds, is precisely what some (and probably most) women want men to do.<sup>815</sup> A further implication is that, in the natural order of consensual sexual relations, men *must* assume a dominant role in order to complement and offset women's coquetry.

Another aspect of woman's alleged ambivalence about sexual matters is the argument that whilst the complainant withheld her consent initially, she came to enjoy the experience in the end. For example, in one trial observed by Adler, the trial judge asked the defendant "The enjoyment wiped out her initial resistance - is that what you are saying?"<sup>816</sup> Similarly, take this astonishing comment made to the press by a New York judge regarding a case in which a masked assailant raped a woman after breaking into her apartment:

As I recall [the defendant] did go into [the victim's] apartment without permission...  
I think [the sexual intercourse] started without consent, but maybe they ended up enjoying themselves.<sup>817</sup>

The implication from such comments is that women can want sex without even knowing it themselves. This effectively denies them any decisive knowledge of their own desire and so, once again, the concept of consent is totally undermined. It also portrays women as sexually capricious - they are apt to change their minds about whether or not they want sex at any time, even when intercourse has gotten underway. Men should, therefore, simply press ahead for the woman will invariably end up enjoying herself. Again, the consent element is negated. Another more insidious, implication is that women actually enjoy being raped. That is, although she did not want it, the complainant nevertheless enjoyed the intercourse. Lees explains that this dangerous proposition is facilitated by the gulf between male and female views on this crime.<sup>818</sup> According to the male judicial view, the essence of rape is penetration. For the victim, rape is a deeply personal, humiliating and life-threatening experience with a much wider coercive context than simply that of the penetrative act. However, because men believe that it is penetration that constitutes the basis for female pleasure in sex, rather than being part of a wider sexual intimacy, the man can argue that the victim has enjoyed penetration and he is believed - even if she has vehemently denied

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<sup>814</sup> Podhoretz (1991), 32.

<sup>815</sup> *Ibid.*

<sup>816</sup> Adler (1987), p 10.

<sup>817</sup> Rhode (1989), p 249.



it and described a terrifying experience.<sup>819</sup> In this way, the rape victim's experience is eclipsed by the male preoccupation with penile penetration and the question of whether or not she consented obscured.

#### 4.6 Conclusion

[F]ar from being effective in controlling sexual violence against women, the law reinforce[s] the informal control of women and help[s] to perpetuate the ideological premises of the traditional gender order.<sup>820</sup>

The central proposition of this chapter is that the dominance of men throughout the criminal justice system is responsible for much of the arbitrary treatment accorded rape victims. Men formulate, interpret and apply the law. These processes are invariably infused with patriarchal ideology and devoid of feminine perspectives. Moreover, misogyny is rife for it infiltrates naturally and seamlessly into this masculine environment and exerts major influence therein. It is suggested that rape cases attract the worst excesses of this misogyny. This is because in no other type of case do men come under such direct challenge from women. Misogyny dictates that this is an untenable proposition because of men's superiority to women. Women should not, therefore, be permitted to take men to task over any issue. Above all, women should not be permitted to challenge men's sexual treatment of them for this conflicts with their status as sexual property.

The influence of misogyny on the law of rape is profound. Lees, for example, observed that rape trials represent "barometers of ideologies of sexual difference, of male dominance and woman's inferiority".<sup>821</sup> Indeed, the entire law of rape is steeped in misogyny. This can be seen first from the fact that rape laws originated, not for the protection of women, but to safeguard male property. The substantive law then endorses this misogynist attitude by the marital rape exemption which enshrined male ownership of wives and the restriction of rape to an act of penile penetration which reflects a concern to prevent the sexual devaluation of women. But perhaps nowhere

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<sup>818</sup> Lees (1989a), p 10.

<sup>819</sup> *Ibid.*

<sup>820</sup> Los (1990), p 163.

<sup>821</sup> Lees (1997), p 70.

is the influence of misogyny more in evidence than in the interpretation and implementation of the law of rape. The formal and informal practices adhered to in this regard reflect patriarchal ideology and its objectives. This was illustrated by an examination of the way in which the crucial issue of consent is determined. It was shown that although the central concern is to establish the victim's state of mind, it is precisely her experience which is excluded - the 'real' rape myth disqualifies the experience of those victims whose rape does *not* fulfil this archetype; the reconstruction of rape into consensual sex disqualifies the experience of those victims whose rape *does* match it. In this way, the consent element is reduced to an absurdity and only the minority of complainants succeed in convincing the courts that the defendant had sexual intercourse with them against their will. Ultimately, Matoesian argues, by failing to take into account the female's experience of violation, the law and the judicial system institutionalise a *decriminalised* position on rape.<sup>822</sup>

Chapters One and Two of this thesis revealed the extent to which the structural features of our criminal justice system shape the rape victim's trial experience. This present chapter has shown that cultural factors also contribute significantly to their treatment at court. Therefore, a complete understanding of why rape victims are treated so objectionably has been achieved. In the following chapter, this understanding will be channelled into formulating suggestions which will bring maximum improvement to this area of the law.

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<sup>822</sup> Matoesian (1993), p 16.



## *Chapter Five*

### *The Way Forward*

#### *5.1 Introduction*

We must seize the legal system and turn it upside-down to shake out the fear, cowardice and hypocrisy.<sup>823</sup>

Rape victims clearly undergo a considerable ordeal when they embark upon the criminal justice process - in addition to the difficulties which they experience alongside victims generally, they are subject to further, highly singular abuses. The central objective of this thesis is to determine how this ordeal might be alleviated so that this victim-group can, at last, have proper access to justice. The previous chapters have provided the background information necessary to achieving this objective. Thus, those aspects of the rape victim's treatment which must be addressed as a priority were outlined.<sup>824</sup> Moreover, a critical insight into the factors responsible for this treatment was provided.<sup>825</sup> Drawing on this information, this present chapter puts forward a number of proposals which, it is suggested, will bring about the improvement required. These proposals address not only the problems singular to rape victims but also those which are incumbent upon victims as a whole. In this way, it is intended to provide an holistic approach to reform, guaranteeing better treatment of both rape and non-rape victims in all major respects.

#### *5.2 Rape Victims*

Chapter Three of this thesis revealed that on top of the difficulties which are common to victims as a whole, rape victims are subject to further maltreatment which sets them quite apart. It was shown that this singular treatment exacerbates this victim-group's trial ordeal and, moreover, greatly inhibits conviction rates for the crime of rape. Chapter Four then demonstrated that this differential treatment derives from the misogynist culture of our criminal justice system. This section aims to examine the ways in which the arbitrary treatment of rape victims might be brought to an end.

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<sup>823</sup> Johnson (1986), p 177.

<sup>824</sup> Chapters One and Three.

Following from Chapter Four's critical findings, it is proposed that the key to this lies in eradicating the negative attitudes which surround the law of rape.

In the event, the legislature has very recently grasped the nettle of rape law reform. The Youth Justice and Criminal Evidence Act 1999 proposes to newly regulate the admissibility of sexual history evidence, that feature of the rape trial which causes complainants the most distress and results in greatest prejudice to their case.<sup>826</sup> Therefore, it is convenient to begin this discussion on reform by examining this new legislation in order to determine whether it really will resolve this most contentious aspect of the law of rape.

### **5.2.1 *Evidential Law Reform***

Section 41 of the Youth Justice and Criminal Evidence Act 1999 came into force in April 2000, repealing section 2 of the Sexual Offences (Amendment) Act 1976. The question now is whether this latest measure will fare any better than the ill-fated section 2 in regulating the admission of sexual history evidence. Under section 2, the gravamen of the problem was that far too much irrelevant sexual history evidence made its way into the courtroom, having been admitted on the basis of the crude assumptions that sexually active women are prone to lying and that they consent indiscriminately. If section 41 is to bring about the required relief, it must be able to ensure, as far as possible, that only such sexual history evidence as is properly relevant is admitted. In this way, the adduction of this type of evidence will be dramatically reduced but without simultaneously jeopardising the defendant's right to a fair trial.<sup>827</sup>

The format of any rape shield legislation plays a critical part in its success. Section 2 simply stated that other than where there is evidence of a previous sexual relationship

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<sup>825</sup> Chapters Two and Four.

<sup>826</sup> Chapter Three, section 3.2.

<sup>827</sup> This right requires that the defendant be permitted to adduce all evidence relevant to his defence. On occasion, a complainant's sexual history may be so relevant (Home Office (1998), para 9.67, p 69). Therefore, an outright prohibition of this type of evidence would clearly interfere with the defence case and, as such, is to be avoided. Permitting the adduction of such sexual history evidence as is relevant presents, on the other hand, no challenge to the *legitimate* running of the defendant's case. In this regard, Eisenbud argues that if the proponents of rape shield laws "prove – not merely assert" that the evidence the statutes bar is not relevant to the issues in the trial, they will not deny defendants any protected right (1975, pp 407, 408).



with the defendant, sexual history evidence should not be admitted save where it would be unfair to the defendant to exclude it. The decision as to unfairness was made by the trial judge. It can be seen, then, that section 2 granted the judiciary an almost unfettered discretion as to when to admit sexual history evidence. It is widely accepted that this is what undermined section 2's usefulness for, clearly, the judiciary espouses the spurious notions of relevancy which section 2 was enacted, in the first place, to counteract.<sup>828</sup> The role of the judiciary in undermining section 2 was recognised by the Home Office in its *Speaking Up For Justice* report, the precursor to the 1999 Act.<sup>829</sup> In considering how the issue of sexual history evidence might best be resolved, it was expressly stated that a mere Practice Direction would not be enough to bring judicial practice into line with the objective of section 2.<sup>830</sup> This recognises that the erroneous assumptions about what is relevant in this context are too deeply ingrained among the judiciary to be addressed by mere guidelines. Consequently, it was recommended that only legislative reform which curtailed judicial discretion by delineating when sexual history evidence is properly admissible, would suffice.<sup>831</sup>

Following from this, section 41 adopts the 'category' approach favoured in many jurisdictions. That is, it prohibits the admission of evidence of "any sexual behaviour" save where it comes within one of a number of pre-defined categories. These are laid out in subsections (3) and (5) which, on their face, are quite restrictive. Section 41(3) allows sexual history evidence to be introduced if the court is satisfied that it "relates to a relevant issue in the trial".<sup>832</sup> Where, however, this "relevant issue" is consent, specific restrictions apply and these are contained in subsections (3)(b) and

<sup>828</sup> See, for example, Temkin (1993); Lees (1996).

<sup>829</sup> Home Office (1998).

<sup>830</sup> *Ibid.* at para 9.65, p 69.

<sup>831</sup> *Ibid.* at p 175 and Recommendation 63, para 9.72, p 69.

<sup>832</sup> Section 42(1)(a) explains that "relevant issue in the case" means any issue falling to be proved by the prosecution or defence. The "relevant issues" in most rape trials will be (i) whether intercourse occurred; (ii) whether the accused was the actor; (iii) whether the complainant consented; and (iv) where the complainant did not consent, whether the accused knew or suspected this. It is unlikely, however, that a complainant's prior sexual behaviour will bear *any* legitimate relationship to whether or not intercourse took place (however, compare *De Angelis* (1979) 20 SASR 288 at 292 wherein it was said that previous sexual episodes might be indirectly relevant in this regard). With regard to the issue of identification, the complainant's sexual history will again have only limited usage for DNA testing has the effect that the defendant's responsibility (or lack thereof) for a particular result will often be established independently of the adduction of evidence of the complainant's other sexual activity (McColgan (1996), p 288, note 67). Consequently, it can be expected that, as with section 2 of the

(c). Section 41(5) then permits sexual history evidence to be admitted for the purpose of rebutting any evidence adduced by the prosecution about any sexual behaviour of the complainant. This subsection explicitly states that any information adduced in this regard is to go no further than is necessary for rebuttal.

Will section 41's structured approach ensure that only properly relevant sexual history evidence is admitted? Promisingly, section 41(4) explicitly rejects the spurious notion that sexually active women are prone to untruthfulness, stipulating that sexual history evidence shall not be regarded as relating to a "relevant issue" in the trial if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness. In addition, section 41(1) provides that evidence pertaining to the complainant's sexual conduct with the defendant will be regulated in the same way as evidence pertaining to her behaviour with third parties. In this way, section 41 may be seen to reject the *presumption* of relevance which has existed to date in the former context, whatever the circumstances. Finally, section 41(6) stipulates that any evidence to be adduced must relate to a *specific* instance (or instances) of alleged sexual behaviour. This should help prevent the admission of *speculative* sexual history evidence and sexual *reputation* evidence, both of which tend to be much more prejudicial than probative.<sup>833</sup> However, with regard to the issue of consent, it is suggested that section 41 will not preclude sufficiently the adduction of sexual history evidence on the basis of the crude assumption that sexually active women consent indiscriminately.

Section 41 proposes to restrict the use of sexual history evidence for the purpose of showing consent by specifying exactly when such evidence may be introduced. Thus,

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1976 Act, section 41(3) will be invoked mainly to go to the issue of consent (both the question of whether the complainant consented and the defendant's belief in this regard).

<sup>833</sup> Section 2, on the other hand, placed no qualification whatsoever on the specific nature of admissible sexual history evidence. Consequently, there was nothing to prevent information about a complainant's sexual history being introduced without any "hard evidence" (McColgan (1996), p 301). Thus, Adler observed that suggestions that the complainant was a prostitute were frequently made without any evidentiary basis whatsoever (1985, p 778). Brown, Burman and Jamieson similarly found that suggestions of prostitution would casually be thrown at complainants (1993, pp 135-163). As to sexual reputation evidence, Woods describes the "standard-type" defence in New South Wales prior to the outright prohibition of this type of evidence as being for the accused to make an unsworn statement from the dock alleging his belief that the complainant was promiscuous, that she slept with virtually anyone and was reputed to be a 'slut' or a 'lowey' (1981, p 4).



subsection (3)(b) allows sexual history evidence to be introduced where it “relates to” sexual behaviour which took place “at or about the same time as” the incident in question. Subsection (3)(c) then provides that it may be admitted where it “relates to” sexual behaviour which is “so similar in any respect”, to any sexual behaviour which took place “as part of the incident in question” or, “at or about the same time as” this incident but is not part of the charge, “that the similarity cannot reasonably be explained as a coincidence”.

Under subsection (3)(b), it seems that the relevancy of the complainant’s sexual behaviour is predicated merely by its *proximity* to the incident in question. This is surely dubious as a general proposition. Take, for example, where the evidence in question concerns the complainant’s sexual behaviour with a third party. Much of the criticism surrounding the operation of section 2 has been the tendency of the courts to admit almost indiscriminately the complainant’s sexual history with third parties. The objection to this is that a complainant’s sexual behaviour with one party is rarely properly relevant to whether or not she consented to intercourse with another but is admitted, instead, on the crude assumption that women who go willingly with one man will behave similarly with all others. The question is whether the proximity of the sexual behaviour to be adduced increases its legal relevance. It is suggested that even very proximate sexual behaviour with a third party will not necessarily be properly relevant to the issue of consent. Therefore, whilst the requirement of proximity will prevent the defence from delving into the complainant’s wider sexual past, it is, nonetheless, insufficiently stringent to prevent the adduction of irrelevant and highly damaging sexual history evidence.

This problem is compounded by the legislature’s choice of the term “sexual behaviour”. The word ‘behaviour’ is clearly open to very wide construction and, falling to be interpreted by a patriarchal and misogynist judiciary, it may well be taken to include behaviour which is scarcely sexual. It is suggested that if the term “sexual behaviour” comes to be interpreted in such a loose manner, then this will increase subsection (3)(b)’s latitude for introducing irrelevant but highly prejudicial material. For example, it is possible that a complainant who was kissing a third party may have this information used against her to show that she consented to intercourse with the defendant half an hour later. The point is that it is one thing to kiss someone

but quite another to have sexual intercourse with him or her or, further, a third party. In addition, the problems typically encountered by ‘acquaintance’ and ‘date-rape’ complainants who are deemed to have consented by simple virtue of their relationship, however limited, with the defendant prior to the incident in question, may be greatly compounded by misuse of subsection (3)(b).<sup>834</sup>

Certainly, there may be occasions when the complainant’s proximate sexual conduct *is* properly relevant to the issue of whether or not she consented to the intercourse in question, perhaps where this conduct is *overtly* sexual and involves the defendant himself. Therefore, defendants should not find themselves precluded outright from introducing such information. However, subsection (3)(b) is simply too flabby, providing the defence with considerable opportunity to go beyond the requirements of relevancy. It is suggested that the New South Wales’ approach is far preferable. There, contemporaneity alone will not guarantee admissibility - the sexual behaviour in question must also “form part of a *connected* set of circumstances in which the alleged prescribed sexual offence was committed”.<sup>835</sup>

Under subsection (3)(c), whether or not a complainant’s sexual past is admitted to go to the issue of consent depends upon its *similarity* in any respect to the sexual behaviour of the complainant which took place as part of the event in question, or, at or about the same time as that event. This similarity must be of such a degree that it cannot reasonably be explained as a coincidence. Unlike subsection (3)(b), this provision enables the defence to probe the complainant’s wider sexual past. The first limb of subsection (3)(c) is similar to the Heilbron recommendation that the complainant’s sexual history should be allowed in where it concerns previous incidents of a strikingly similar nature to the incident in question and which are so highly relevant that it would be unfair to exclude them.<sup>836</sup> Vera Baird, author of *Rape in Court*, argues that this approach is “extremely flawed” because “it gives a defendant who knows about a particular sexual encounter the woman may have had,

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<sup>834</sup> See, for example, Grace, Lloyd and Smith (1992) and Harris and Grace (1999) for an indication of the impact which the relationship between complainant and accused have on the attrition of the rape offence.

<sup>835</sup> The Crimes Act 1900, section 409B(3)(a). (Emphasis added.)

<sup>836</sup> Heilbron Committee (1975), para 137.



the opportunity to do something similar and blame her for his approach”.<sup>837</sup> The second limb of subsection (3)(c) goes further and permits evidence of sexual behaviour also where it is similar to behaviour which took place at or about the same time as that event. As pointed out, sexual behaviour will not necessarily be relevant simply because of its contemporaneity with the alleged rape. Therefore, to deem the complainant’s more remote sexual past relevant because of its similarity with events proximate to the alleged rape could have the effect of enabling irrelevant material to be adduced on the basis that it is similar to other irrelevant material! Baird concludes that subsection (3)(c) “will just be abused, with defence counsel arguing her past proves she likes it in a particular way”.<sup>838</sup>

It is suggested that subsection (3)(c) would have provided adequate protection for defendants if it had not gone beyond the Heilbron formulation. Alternatively, its second limb could have been more restrictive. For example, instead of its current formulation, it could have provided that the evidence to be adduced had to be strikingly similar to the complainant’s sexual behaviour at or about the same time as the incident in question, which behaviour “forms part of a connected set of circumstances in which the alleged prescribed sexual offence was committed”. Further, the clause “in any respect” should have been excluded or made to read “in any *material* respect”. This is because, as it stands, the past sexual behaviour of a complainant may satisfy the striking similarity test and so be admitted on the basis of one superficial similarity even though it is disparate in all other major respects from her behaviour during or, at or about the same time as, the event in question.

The other purpose for which sexual history evidence may be admitted under the new legislation is in order to rebut any evidence adduced by the prosecution about any sexual behaviour of the complainant.<sup>839</sup> Section 41(5) explicitly states that any information adduced in this regard is to go no further than is necessary for rebuttal. An example may be where the prosecution asserts that the complainant is a virgin and there is evidence that she is not. The normal rules of evidence would allow her to be cross-examined upon that assertion for the purposes of challenging her credibility.

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<sup>837</sup> See Langdon-Down (2000).

<sup>838</sup> *Ibid.*

However, as McColgan explains, such a challenge does not rest on any link between truthfulness and chastity *per se* but depends, rather, upon the general view of credibility as indivisible - if a witness can be shown to have lied about any particular fact, her testimony in relation to the matters at issue is less worthy of belief.<sup>840</sup> Credibility is a collateral issue so that, generally speaking, rebuttal evidence cannot be led once the witness has answered the challenge as to the truth of his or her evidence. However, if the prosecution rely on sexual history evidence to suggest non-consent, the normal rules mean that this evidence would be subject to rebuttal evidence.

Therefore, on its face, subsection (5) is quite unobjectionable. However, the danger is that evidence will be admitted in cases where the prosecution has not in fact made any assertion relating to the complainant's sexual behaviour or lack thereof, but where it is alleged that the prosecution case rests in part upon an *implied* assertion about that sexual behaviour.<sup>841</sup> For example, according to McColgan, any young complainant in England and Wales is invariably taken impliedly to represent her virginity.<sup>842</sup> She cites *SMS* [1992] CLR 310 as an example. There, the Court of Appeal accepted that evidence of alleged sexual activity on the part of the fourteen year old complainant should have been admitted to counter the assumption which would, allegedly, otherwise have been made by jurors that she was a virgin.<sup>843</sup> Therefore, if section 41 is to protect complainants from the introduction of irrelevant sexual history evidence, subsection (5) must not permit rebuttal evidence unless the prosecution have made *explicit* claims about the complainant's sexual behaviour.<sup>844</sup> McColgan suggests that if it appears to the defence that the prosecution is making an implication about the complainant's sexual behaviour then a *voir dire* should be held to establish whether this is, in fact, part of the prosecution case. If it is, then the prosecution should be required to make the claim explicitly which would, in turn, entitle the defence to lead sexual history evidence in rebuttal.<sup>845</sup>

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<sup>839</sup> This is similar to the second of the Heilbron Committee's recommended exceptions to a general rule of exclusion of sexual history evidence ( 1975, para 138).

<sup>840</sup> McColgan (1996), p 289.

<sup>841</sup> *Ibid.*

<sup>842</sup> *Ibid.*

<sup>843</sup> *Ibid.*

<sup>844</sup> *Ibid.*

<sup>845</sup> *Ibid.*



Ultimately, although much more restrictive than section 2, section 41 leaves too many loopholes. Given the centrality of sexual history evidence to the defence's key strategy of undermining the personality of the complainant, it is a certainty that these will be exploited at every opportunity. Unfortunately, the judiciary has shown that they cannot be relied on to prevent section 41 being circumvented in this way. However, yet more worrying is section 41's almost complete failure to restrict the introduction of sexual history evidence for the purpose of showing the defendant's belief in the complainant's consent, this being a "relevant issue in the case".<sup>846</sup>

The defendant's mistaken belief that the complainant consented to the intercourse forming the rape allegation is a valid defence. Following *Morgan*, whilst this belief must be honest, it need not also be reasonable.<sup>847</sup> Consequently, it might have been thought that the 'mistaken belief' defence would be heavily relied upon. However, Lees reports that it has given rise to appeal on only two occasions since 1976.<sup>848</sup> Jamieson explains that the only reason that it is not used more often is because defence counsel simply find it so easy to attack the complainant's credibility.<sup>849</sup> This, together with the spurious standards used to determine non-consent, means that complainants find it very difficult to prove that they did not consent.<sup>850</sup> Consequently, the question of the defendant's state of mind is generally quite superfluous. However, it is suggested that this state of affairs will change under section 41.

Despite their flaws, it is clear that subsections (3)(b) and (c) will manage to reduce the introduction of sexual history evidence for the purpose of showing the complainant's consent. This will mean that more complainants will be able to persuade the courts of their non-consent. However, if this happens, defendants will rely more and more on the 'mistaken belief' defence and, given the prejudicial impact of sexual history evidence, will seek to base this defence on their knowledge of the complainant's sexual conduct. Because subsection (3) places little restriction on the introduction of sexual history evidence for this purpose, a great deal of irrelevant material will find its

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<sup>846</sup> See section 41(3) in conjunction with section 42(b).

<sup>847</sup> [1976] AC 182.

<sup>848</sup> Lees (1996), p 245.

<sup>849</sup> Jamieson (1994).

<sup>850</sup> See Chapter Four, section 4.4.

way into the courtroom. Moreover, because the defendant's belief does not have to be reasonable, it is suggested that greater reliance on this defence will mean that acquittals will be granted on more spurious grounds than under section 2 as defendants seek to support their mistaken belief on such sexist assumptions as that a woman consents to sex when she accepts a lift from him, goes to his house or invites him to hers, accepts a drink or a dinner, etc.<sup>851</sup>

Because the defendant's belief in consent is a valid defence, it must be possible to support it with evidence. However, section 41 could have done much more to prevent this defence being abused in the context of sexual history evidence. Again, the New South Wales approach is preferable for it places a requirement of contemporaneity on the evidence to be adduced in this regard. Woods explains that this prevents the accused from arguing, 'Because I heard she slept with X last month, I thought she was consenting to sex with me on this occasion'.<sup>852</sup> Providing that he refers to a specific instance (or instances), then this is precisely the highly objectionable stance that defendants in this jurisdiction are able to take and will take more often following section 41.

### **5.2.2 Substantive Law Reform**

The Home Office is reviewing the substantive law of rape and is thought to be in favour of changing the defence of belief in consent.<sup>853</sup> Baird argues that one option would be to adopt Canadian legislation which requires the prosecution to show that the complainant did not consent and that the defendant did not take reasonable steps to ascertain this.<sup>854</sup> One benefit of this approach is that the defendant cannot rely solely on a mistaken belief, reasonable or otherwise, that the complainant was consenting to get him off the hook - he must be able to support his belief by having taken reasonable steps to ascertain her consent. Consequently, this prevents him from "trawling through the woman's past" in an effort to justify his actions.<sup>855</sup> It is suggested that if our substantive law were amended in this way, it would remove the

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<sup>851</sup> Los (1990), p 166.

<sup>852</sup> Woods (1981), p 35.

<sup>853</sup> See Langdon-Down (2000).

<sup>854</sup> *Ibid.*

<sup>855</sup> *Ibid.*



problem which the ‘mistaken belief’ defence is likely to cause under section 41 of the Youth Justice and Criminal Evidence Act 1999.

Another reason for adopting the Canadian approach is that it would restore proper balance to rape trials. Currently, because they are fought on the basis of consent, the focus in the majority of rape trials is unswervingly upon the complainant - did she consent or did she not? Then, the methods used to determine this question centre around her conduct and character. Loh argues that the way in which the consent issue is determined is “prejudicial to and weakens prosecution”.<sup>856</sup> One reason for this is the spurious nature of the various standards of non-consent which are used.<sup>857</sup> Another reason is that, with the complainant being served up like a “laboratory specimen on a microscope slide”, there is consequently much less scrutiny of the defendant, in terms both of his conduct immediately surrounding the specific incident in question and also his wider behaviour and character.<sup>858</sup> Ultimately, this prevents any realistic evaluation of his guilt. In the first place, not being possessed of the full facts about his conduct and character, juries frequently do not have adequate information with which to determine properly his culpability. In the second place, they are distracted from this question by the profusion of damning information about the complainant which causes them to get caught up in adjudging *her* guilt and not his.

The Canadian approach is preferable because, by making the defendant’s conduct an operational indicator of the criminality of rape, the jury is *formally* required to give consideration to his culpability in the incident. This recognises that men should assume responsibility for their sexual conduct. Our substantive law, on the other hand, assists in nullifying male responsibility in this regard by its failure to formulate the issue of consent in bipartisan terms, that is, as one which also imposes certain obligations on the man prior to intercourse such as, for example, the obligation to seek approval and agreement. Similarly, Lees explains that the problem is that there are no positive legal definitions of consensual sex, so that the burden of negotiated consent is

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<sup>856</sup> Loh (1980), p 556.

<sup>857</sup> See Chapter Three, section 3.2 and Chapter Four, section 4.4.

<sup>858</sup> McEwan (1989), p 642. See also Lees (1989b), pp 14, 15; (1997), p 61.

not mutually shared and instead women are held responsible for giving or denying sexual access.<sup>859</sup> She argues that it is important to determine legally exactly where to draw the line between coercive sex (rape) and mutually negotiated sexual relations.<sup>860</sup> The distinction between the two can be made, she says, by exploring the woman's experience, focusing on the negotiation leading up to the sexual encounter, and recognising that normal sex involves some form of mutual negotiation.<sup>861</sup> Ultimately, instead of the usual one-sided enquiry into the issue of consent (involving all sorts of ill-judged assumptions about women, rape and sex), much more focus should be placed on what led the defendant to deduce that the complainant consented. Amending our substantive law in accordance with the Canadian model would go some way towards ensuring such a bilateral approach.

### 5.2.3 *Cultural Reform*

Evidentiary and substantive changes of the type previously discussed would lead to significant improvement within the law of rape. Section 41, whilst by no means a perfect legislative instrument, will reduce the introduction of irrelevant sexual history evidence to some extent. Reforming the substantive law to include the defendant's conduct as an operational indicator of rape would lead to a greater focus on the defendant's conduct and, consequently, on the question of his guilt.<sup>862</sup> It would also strengthen section 41 by removing the 'mistaken belief' defence and thus preventing defendants from using the complainant's sexual past as a means of justifying their conduct. Indeed, it could conceivably lead to a general reduction in the use of this type of evidence. Loh explains that if the *actor's* conduct is the legal criterion, then evidence pertaining to the victim's prior unchastity becomes mostly irrelevant for proving that element. But if the *victim's* conduct is determinative, past sexual

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This lack of scrutiny of the defendant in a trial for rape is, in fact, formalised within the law by the fact that rape cases represent the only exception to section 1(f)(ii)b of the Criminal Evidence Act 1898 (see Chapter Three, section 3.4).

<sup>859</sup> Lees (1996), p xviii.

<sup>860</sup> *Ibid.* at p xix.

<sup>861</sup> *Ibid.*

<sup>862</sup> Another necessary and related move would be to give section 1(f)(ii)b the same application in rape trials as it has in all others. The Home Office recognised the need for this and proposed that where the defendant raises the complainant's sexual history or criminal record, the defendant's criminal record should also be introduced (1998, p 175). To effect such change would mean that juries are presented with a much more accurate picture of the defendant by which to adjudge his guilt or innocence. In addition, by putting the defendant's own bad character or even previous convictions in the balance, such a move might also lead to a reduction in the current tendency to gratuitously malign the character of rape complainants, whether by adducing their sexual history or otherwise.



conduct can be material.<sup>863</sup> Consequently, he explains, the definitional standard is the most important conceptual issue in rape law.<sup>864</sup>

However, it is suggested that if these and any other legislative reforms within the law of rape are not backed up by attitudinal reform, they will be seriously undermined. Take section 2 of the Sexual Offences (Amendment) Act 1976. This measure failed utterly to restrict the admission of irrelevant sexual history evidence because the sexist attitudes of the judiciary meant that they continued to admit this evidence on the basis of erroneous assumptions of relevance. Consequently, section 41 is a much less discretionary measure, reducing considerably the freedom of judges to admit improper sexual history evidence.<sup>865</sup> Nevertheless, research shows that attitudes about sexual assault and its victims permeate the implementation of even model legislation.<sup>866</sup> In Michigan, for example, the legislature took the radical step of removing the word consent from the substantive law, adopting the “actor’s force” as the new standard of criminalisation.<sup>867</sup> The move was designed to eradicate the spurious indicators of rape that were traditionally used. However, Loh observed that reliance on them has not lessened - unless there is evidence of resistance, for example, it is less likely that the police will investigate, prosecutors will charge, and juries will convict.<sup>868</sup>

The question now is how exactly are the misogynist attitudes which currently pervade the criminal justice system to be broken down?

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<sup>863</sup> Loh (1980), p 548.

<sup>864</sup> *Ibid.*

<sup>865</sup> In every other context, the current trend is to reject rule-based evidential reform in favour of a more discretionary approach. This reflects the growing trust in decision-makers. The legislature’s most recent response to the problem of sexual history evidence, on the other hand, indicates that there is by no means the same trust when it comes to the law of rape.

<sup>866</sup> Caringella-McDonald (1985), p 80. See also Loh (1980); Polk (1985); Renner and Sahjpaul (1986); LaFree (1989); Los (1990); Horney and Spohn (1991).

<sup>867</sup> Criminal Sexual Conduct Act of Michigan 1974.

The move led to the early comment that “under the new law it is clearly no longer necessary for the prosecution to prove non-consent” (Legislative Note (1974), p 226). In practice, however, the fact of consent need not be elevated to a legal standard because of its potency in point of fact at trial - even removing it from the substantive law will not remove it from the jury’s collective mind. Similarly, Temkin explains that, no matter how rape laws are restructured, the issue of consent is hard to circumvent, so that the temptation remains for defence counsel to seek to show that the complainant is the type of woman who might have consented (1987, p 162).

### 5.2.3.1 Legislation

Legislative alterations represent a step in the direction of progress. In recent years, a number of important changes have been made. In 1992, the House of Lords upheld the Court of Appeal's decision that rape can be committed within marriage.<sup>869</sup> This ruling was given statutory effect by section 142 of the Criminal Justice and Public Order Act 1994. In 1993, the Sexual Offences Act changed the law so that boys under the age of fourteen can now be charged with rape, thus repealing the hitherto irrebuttable presumption that a boy under this age was incapable of committing rape.<sup>870</sup> In 1994, the Criminal Justice and Public Order Act abolished the mandatory corroboration warning requirement.<sup>871</sup> In 1997, the Crime (Sentences) Act 1997 provided that a person convicted of rape or an attempt, who has served a sentence of imprisonment for an offence within the categories of offences listed in section 2(5), which includes rape and an attempt, must receive a sentence of life imprisonment.<sup>872</sup> And in 1999, the rules as to the admission of sexual history evidence have been amended.<sup>873</sup>

O'Doherty says that the sheer scale of these changes shows the altered perception of Parliament and the courts towards the crime of rape and its victims.<sup>874</sup> For example, greater sentencing severity suggests that the seriousness of this crime is being more fully appreciated, if only for the small number of rapes, which actually end in conviction.<sup>875</sup> These legislative changes are also of considerable symbolic and political importance to women:

The significance of radical legislation lies also in the break which it represents with past history and the unfortunate saga of the mistreatment of rape victims by the

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<sup>868</sup> Loh (1980), p 557.

<sup>869</sup> *R v R* [1992] 1 AC 599.

<sup>870</sup> This irrebuttable presumption remains intact in Northern Ireland.

<sup>871</sup> Section 32(1).

<sup>872</sup> Section 2.

However, in its *Speaking Up For Justice*, the Home Office remarked that it has yet to be seen how frequently judges will use their discretion in "exceptional circumstances" to impose sentences other than life (1998, p 156).

<sup>873</sup> Sections 41 - 43.

This Act also contains a number of procedural reforms which will have a positive effect on the rape complainant's experience at court (see section 5.3.1 below).

<sup>874</sup> O'Doherty (1998), p 680.

<sup>875</sup> In their study, Harris and Grace found that only six per cent of the cases originally recorded by the police as rape resulted in convictions for rape (1999, p x). This represents only nine per cent of those incidents crimed as rape which, they explain, equates with national statistics.



criminal justice system. It is to be seen as an attempt to make a new beginning, free of some of the old associations.<sup>876</sup>

In this way, legislative reform acts as a catalyst for wider attitudinal change. Loh explains that the criminal law has a “moral or sociopedagogic” purpose to reflect and shape our values and beliefs - new rape law symbolises and reinforces newly emerging conceptions about the status of women and the right of self-determination in sexual conduct.<sup>877</sup>

On this understanding, even though section 41 will not provide a total solution to the sexual history evidence dilemma, it does establish a strong policy in support of rape victims, giving notice that all women are ‘rapeable’, and this should help to counteract the historical bias against sexually active women. Similarly, Birch argues that the abolition of the mandatory corroboration warning has helped to remove, to some extent, the “last vestiges of respectability from the argument that complainants in sexual cases are, merely because they are complainants, likely to be motivated by spite, fantasy or neurosis”.<sup>878</sup>

#### *5.2.3.2 Education*

Whilst legislative developments may discourage misguided, erroneous beliefs about rape, more is needed if they are to be totally eradicated. This can be seen from recent research which reveals that, despite the abolition of the corroboration warning, disbelieving and stereotypical attitudes about women who report rape persist.<sup>879</sup> It is suggested that if criminal justice officials were appraised of the reality of rape, this would result in reduced adherence to the stereotypes and myths which currently shape their attitudes.

One way in which this could be done would be to run training schemes which would aim forcefully to dispel these myths by presenting a serious challenge to them. This could only be done by presenting hard, empirical evidence showing clearly the fallaciousness of current attitudes. For example, the research which shows that the

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<sup>876</sup> Temkin (1987), p 154.

<sup>877</sup> Loh (1980), p 624.

<sup>878</sup> Birch (1996), p 45.

<sup>879</sup> Temkin (1999), p 38. See also Harris and Grace (1999), pp 11-24 in this regard.

In addition, the ‘real’ rape myth, which incorporates the assumption that rape complainants are liars, is still heavily relied on (see Chapter Four, section 4.4).

‘real’ rape stereotype represents, in fact, only the minority of actual rapes would need to be presented and the more usual nature of this crime emphasised. Essential to this would be the presentation of the research which proves the existence, nature and impact of the Rape Trauma Syndrome. Data proving that false reporting rates for rape are comparable with/less than those for other crimes would also be crucial. Attrition rates for rape at every stage (including reporting) needs to be highlighted and compared with the known prevalence of this crime. This is among the information which must be vigorously disseminated.

As a double imperative, the scheme must be mandatory and must apply to every single criminal justice official, from the police right through to the judiciary. Furthermore, they must be conducted by an independently commissioned, specialist body, the composition of which would require careful consideration. Currently, training for the various professionals within the criminal justice system is provided by disparate bodies. The police, for example, receive the majority of their training from the Police Training Council; the judiciary is informed by the Judicial Studies Board. It is necessary to entrust this ‘attitudinal’ training to a single, independent organisation because this would ensure that the essential messages are conveyed accurately, uniformly and in the spirit intended.

With specific regard to the judiciary, it is suggested that educating them about the realities of rape would go some way towards ensuring a more effective implementation of section 41. As explained, the central problem under section 2 was that the judiciary was admitting sexual history evidence on the basis of crude assumptions of relevance. Although allowing judges much less discretion, section 41 still leaves room for these assumptions. If section 41 is not to go the way of section 2, a complete re-appraisal of the concept of relevancy in this context is necessary. This should aim to eradicate the myths which currently inform judicial determinations of relevancy and replace them with the truth about this crime, such as that *all* women are rapeable. This is where the aforementioned training would come in. Similarly, Temkin argues that section 41 must “go hand in hand with gender awareness training for judges” on the basis that “no provisions will work unless you have judges who



understand the need for this sort of legislation, and who don't come along with a whole baggage of myths and stereotypes".<sup>880</sup>

This type of 're-education' is already in operation in the United States, albeit with regard to the police only. Harry J. O'Reilly, who supervised the setting up of the first Sex Crimes Analysis Unit (New York) has devised a training programme for sexual assault investigators who work in units of this kind.<sup>881</sup> It focuses primarily on *attitudinal* training, which involves *inter alia*, breaking down the myths of rape. Police officers are taught that rape does not only happen in dark alleyways and deserted places, that the victim's dress is immaterial, that women do not enjoy rape, and most important of all, that few reported rapes are likely to be fabricated. Officers also receive a detailed explanation of the Rape Trauma Syndrome.<sup>882</sup> O'Reilly concedes that attitudinal training is difficult but testifies that it can work. Indeed, he claims that "the New York City police have changed their whole rationale".<sup>883</sup>

#### 5.2.3.3 Democratisation

The overwhelming influence of stereotype and myth on the treatment of rape complainants and the disposition of their grievance demands that criminal justice officials be educated about the realities of this crime. However, it is suggested that the negative attitudes surrounding this offence are so institutionalised that more radical intervention will be needed to break them down. This is because these attitudes are the unavoidable product of our overwhelmingly male criminal justice system.<sup>884</sup> Consequently, until this negative cultural environment is altered, these undesirable attitudes will continue to be bred, fostered and adhered to. What is needed, therefore, is to change the actual composition of the criminal justice system - Los argues that the control of men needs to be "broken".<sup>885</sup>

Take the judiciary for example. At present, there are no women Law Lords among the ten in the House of Lords and only one in the Court of Appeal. In 1995, only six out of ninety-five high court judges and twenty-nine among 514 circuit judges were

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<sup>880</sup> See Langdon-Down (2000).

<sup>881</sup> O'Reilly (1984).

<sup>882</sup> *Ibid.*

<sup>883</sup> *Ibid.* at p 103.

<sup>884</sup> See Chapter Four in this respect.

female.<sup>886</sup> In 1992, only five per cent of QC's were female.<sup>887</sup> Moreover, a survey showed that eighty-four per cent of the twenty-seven judges appointed to the Lords, the Court of Appeal and the High Court of Appeal between 1989 and 1991 had been to public school, and seventy-seven per cent to Oxford or Cambridge.<sup>888</sup> In addition, most high court judges are appointed between the ages of fifty and sixty.<sup>889</sup> The judiciary is, therefore, largely comprised of a group of white, middle/upper-class, elderly men, many of whom have been educated in single-sex male public schools wherein extreme forms of masculinity tend to be fostered.<sup>890</sup>

A study conducted by Feldman-Summers and Palmer illustrates the way in which the demography of the criminal justice system shapes the treatment of rape victims. They carried out a comparative analysis of the attitudes toward rape complainants of criminal justice officials (police, prosecutors and judiciary) and social service personnel.<sup>891</sup> They found that the criminal justice personnel tended to be unsympathetic towards and suspicious of many (if not most) rape victims.<sup>892</sup> Their beliefs about the causes of rape and how rape can be prevented tended to place a substantial degree of the blame and responsibility on the victim as well as on the stereotypical sexually frustrated and mentally ill attacker.<sup>893</sup> Social service personnel, on the other hand, tended to see the cause of rape as being inherent in the socialisation process of men and thought that the frequency of rape would be reduced by changing social norms.<sup>894</sup> This approach can be seen to be much more in tune with the realities of rape.

Feldman-Summers and Palmer found that the participants in the study differed widely on a number of variables in addition to group membership. That is, the social service personnel were considerably younger than the members of the criminal justice personnel and consisted of a higher proportion of females.<sup>895</sup> Thus, they concluded,

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<sup>885</sup> Los (1990), p 169.

<sup>886</sup> Gibb (1995).

<sup>887</sup> Nacro (1992).

<sup>888</sup> Billen (1992).

<sup>889</sup> Lees (1996), p 246.

<sup>890</sup> *Ibid.*

<sup>891</sup> Feldman-Summers and Palmer (1980).

<sup>892</sup> *Ibid.* at p 34.

<sup>893</sup> *Ibid.* at pp 34, 35.

<sup>894</sup> *Ibid.* at p 34.

<sup>895</sup> *Ibid.* at p 35.



age and sex, rather than group membership *per se* could account for the differences in belief.<sup>896</sup> On the basis of their findings, they recommended that to ensure positive treatment of rape victims and effective processing of rape complaints we must (a) provide appropriate education and training for people in the criminal justice system so as to encourage the development of beliefs which are *inconsistent* with blaming the victim or discounting her credibility, or (b) try to select people for positions of authority who hold non-stereotypic beliefs about rape and rape victims.<sup>897</sup>

It is suggested that the best solution would be to introduce many more women to the system at all levels. Having concluded that the “male dominated judiciary” poses serious problems for rape complainants, the Home Office has similarly recommended the appointment of more women.<sup>898</sup> One way in which this could be done would be to overhaul recruitment and selection procedures. A full-scale study into discrimination within the Bar and judiciary, for example, revealed problems at all levels - in obtaining training places (pupilages) and permanent jobs (tenancies), in the allocation of work by clerks, in earnings and in the selection process for promotion.<sup>899</sup> Clearly, these are issues which need to be addressed so that many more women can take up their place within the legal profession.

### *Summary*

The treatment of rape victims and the attrition of the crime of rape are dictated largely by the attitudes of criminal justice officials. These attitudes involve derogatory and unrealistic assumptions about women, sex and rape. Ultimately, they sustain and encourage violence against women.<sup>900</sup> Until these misogynist attitudes are dispelled, rape victims will continue to get a raw deal within the criminal justice system and changes to the substantive and evidential law aimed at assisting them in this regard will be defeated. It was shown that the only sure way to eradicate these attitudes is by overhauling the physical composition of the criminal justice system to create a strong female presence. This would reduce the dominance of misogynist ideology and simultaneously raise the profile and influence of feminist perspectives. If this were

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<sup>896</sup> *Ibid.*

<sup>897</sup> *Ibid.* at p 38.

<sup>898</sup> Home Office (1998), p 176.

<sup>899</sup> *Sex Prejudice Findings Prompt Demand for Overhaul of Bar*, *The Times* 25/11/92.

<sup>900</sup> Temkin (1982), p 419.

achieved, the system could be trusted to implement the law of rape with the integrity and fairness necessary to ensure justice for rape victims. In the specific context of sexual history evidence, for example, if the judiciary were free of misogynist cultural conditioning, the loopholes left by section 41 would pose no real threat to the overall efficacy of this provision. Indeed, the question of relevance could be left to their discretion without statutory regulation.<sup>901</sup>

### 5.3 *Victims as a Whole*

The objective of this thesis is to provide suggestions for reform which will lead to holistic improvement in the treatment of rape victims within the criminal justice system. So far, only those problems which are unique to rape victims have been addressed. Improving these specific aspects of their treatment is clearly imperative and the measures suggested would bring enormous relief, eradicating much of the arbitrary treatment to which they are currently subject. However, if the suffering of rape victims is to be fully alleviated, it is essential to go beyond the problems singular to them and address also the major difficulties incumbent upon victims as a whole.<sup>902</sup> This is because these generic difficulties cause victims considerable distress.<sup>903</sup> For example, cross-examination is a gruelling ordeal for all victims.<sup>904</sup> Therefore, even if the extent to which rape victims can be questioned about their sexual behaviour is dramatically reduced, this will not mark the end of improper assaults upon their character or bullying cross-examination. This is because these are rooted in the inadequate regulation of cross-examination not only in rape cases but across the board and in the nature of cross-examination itself.<sup>905</sup>

This section aims to establish how the central dilemmas facing victims as a whole - the cross-examination ordeal and their lack of information, participation and representation during the processing of their grievance - might be alleviated. Again, it is crucial to take into account the source of these dilemmas which, Chapter Two revealed, is located in the structural and functional features of our criminal justice

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<sup>901</sup> McColgan (1996), p 307.

<sup>902</sup> These were outlined in detail in Chapter One of this thesis.

<sup>903</sup> Indeed, it is arguable that they affect rape victims much more keenly given the degree of trauma associated with the offence itself (Chambers and Millar (1986); McEwan (1992); Brereton (1997); Home Office (1998)).

<sup>904</sup> Chapter One, section 1.2.2.

<sup>905</sup> Ellison (1998), p 614.



system. As before, it is convenient to begin the present discussion on reform with a review of recent legislative change.

### 5.3.1 *Procedural Reform*

The Youth Justice and Criminal Evidence Act 1999 introduced a number of important procedural measures aimed at lessening the cross-examination ordeal for vulnerable and intimidated witnesses. The purpose of these ‘special measures’ is to enable these witnesses to give the best quality of evidence.

Sections 16 and 17 of the Act specify who is eligible for assistance. Section 17(4) specifically provides that sexual offence complainants are eligible. As to the special measures which may be available, these are listed in sections 23 to 30 and mirror, to a large extent, the recommendations outlined in the *Speaking Up for Justice* report.<sup>906</sup> Section 23 provides for the use of screens to shield witnesses from the accused.<sup>907</sup> Section 24 permits the giving of evidence by way of a live television link or other arrangement whereby a witness, while absent from the courtroom, is able to see and be seen by relevant persons.<sup>908</sup> Section 25 permits, in sexual offence cases or where intimidation is a feature, the exclusion of certain parties from the court whilst the witness is giving evidence. Section 26 provides for the wearing of wigs and gowns to be dispensed with. Section 27 permits the giving of evidence-in-chief by way of pre-recorded video, unless the interests of justice preclude this. Further, section 28 provides for cross-examination and re-examination to be admitted in the form of pre-recorded video where the witness has given his evidence-in-chief by this means. Section 29 provides for any examination of the witness to be conducted through an interpreter - an “intermediary” - if necessary. Finally, section 30 provides for the witness to be provided with communication aids if necessary. The Act further provides for the protection of certain witnesses from cross-examination by the accused. The witnesses automatically coming under this protection are complainants

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See Chapters One and Two above in this regard.

<sup>906</sup> Home Office (1998).

<sup>907</sup> This facility is already available to children in certain types of case, having been first introduced in 1987 (*XYZ* (1990) 91 Crim App Rep 36). The use of screens for adult witnesses was discussed in *Cooper; Schaub* [1994] CLR 531 in which it was stated that a screen should be used only in exceptional circumstances. In *Foster* [1995] CLR 333, the Court of Appeal stated that the trial judge was engaged in a balancing exercise between the interests of justice and the interests of the defendant.

<sup>908</sup> Again, this facility is available, in certain circumstances, to child witnesses (section 32 of the Criminal Justice Act 1988).

in sexual offence proceedings (section 34) and child complainants and other child witnesses in cases involving certain specified offences (section 35).<sup>909</sup> Section 36 provides the court with a discretion to prohibit the accused from cross-examining a witness in other situations.<sup>910</sup>

These procedural reforms will clearly go some way towards reducing the cross-examination ordeal for vulnerable victims. However, it remains to be seen whether or not the courts will often give leave for their use. Simply because a witness comes under either section 16 or 17 does not mean that the special measures will automatically be available. Rather, the court must decide whether any of the measures would, in its opinion, be likely to improve the quality of evidence given by the witness (section 19(2)(a)). The court must then consider whether the measure(s) might tend to inhibit such evidence being effectively tested by a party to the proceedings (section 19(3)(b)). This will lead invariably to a balancing exercise between the rights of the victim and those of the accused and, it is submitted, in rape cases, the defendant will win out. There is also the problem that many of the special measures involve considerable cost. The question then is whether or not sufficient funds will be made available to ensure a realistic possibility of providing these facilities for eligible witnesses. In the context of the Witness Support scheme, Shapland and Bell found that funding is “clearly problematic”.<sup>911</sup> Therefore, it is arguable that schemes aimed at assisting particular witness-groups will fare no better.

### 5.3.2 *Structural Reform*

Whilst the procedural mechanisms introduced under the 1999 Act will alleviate the cross-examination ordeal for vulnerable victims, they do not address the central dilemma which is the inherent brutality of this process. Consequently, they will not prevent the worst excesses of cross-examination. The question then is whether

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<sup>909</sup> This step may be seen to be a direct consequence of two highly publicised rape cases in which the defendants had subjected the complainants to cross-examination ordeals lasting for days. In one case, the defendant Ralston Edwards, cross-examined the complainant for six days and wore the same clothes as had had on when he committed the offence. The victim, Julia Mason, said “I was raped by Edwards and again by the British justice system”. In the second case, the victim was cross-examined for twelve days by a number of co-defendants. (*The Guardian*; *The Daily Telegraph*; *The Mirror* 23/8/96).

<sup>910</sup> This discretion may be exercised if it appears to the court that the quality of the evidence given by the witness would be likely to be diminished if the accused cross-examined him or her and would be likely to be improved if the defendant did not. This discretion is subject to the interests of justice.

<sup>911</sup> Shapland and Bell (1998), p 542.



reforming the structure of our legal process would yield better results. That is, because much of the brutality of the cross-examination process is an inevitable consequence of the adversarial tradition, would a non-adversarial or inquisitorial approach hold any advantages for victims? Ellison suggests that victims would be greatly assisted by reducing reliance on oral testimony and allowing the judiciary to take a more active role in trial proceedings.<sup>912</sup>

#### 5.3.2.1 Oral Testimony

Challenging the adversarial tradition's "deep-seated belief that oral evidence is invariably best", Ellison questions whether cross-examination is always the most appropriate mechanism for testing the evidence of vulnerable witnesses.<sup>913</sup> Perhaps, she suggests, an examination directed by a trial judge or by an appointed impartial third party would be preferable, in certain circumstances, to live cross-examination conducted by opposing counsel.<sup>914</sup> Alternatively, greater reliance could be placed on written evidence rather than oral testimony. She refers to the Dutch approach whereby written statements largely replace the oral evidence of witnesses.<sup>915</sup> This is because the criminal trial serves a very different function in the Netherlands than it does here - it is not a forum for oral argument but for the evaluation of the written evidence contained in the dossier.<sup>916</sup> Therefore, direct oral testimony is not regarded as inherently superior to written evidence.

The implication of the Dutch approach for victims is that they are often spared the considerable ordeal of presenting their evidence orally and being cross-examined in open court. Moreover, the particular vulnerability of sexual offence complainants is given special acknowledgement for, Ellison explains, it is endeavoured as a general

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<sup>912</sup> Ellison (1999).

Ellison criticises the Home Office for not having taken such a root and branch approach to reform in its *Speaking Up For Justice* report:

While recognising that many of the difficulties encountered by vulnerable witnesses stem directly from the adversarial trial process, the appropriateness of that process is not questioned by the Working Group. The failure of the Working Group to look beyond the framework of the adversarial criminal trial for solutions or to re-assess the validity of key evidentiary safeguards is presented as a missed opportunity (*loc. cit.* at pp 29, 30).

<sup>913</sup> *Ibid.* at p 37.

<sup>914</sup> *Ibid.*

<sup>915</sup> *Ibid.* at p 39.

<sup>916</sup> *Ibid.* at p 38.

The dossier, Ellison explains, is a record of each stage of the investigative process and it will contain, among other documents, the written statements of witnesses and the accused. In serious or complex

rule to keep them out of the courtroom.<sup>917</sup> Placing greater reliance on documentary evidence in this jurisdiction would obviously hold great advantages not only for rape victims but victims generally.<sup>918</sup> Whilst affecting one of the mainstays of our criminal process, such a move would not compromise our adversarial identity.<sup>919</sup> Consequently, it is a feasible possibility. Indeed, the Home Office has made the suggestion that, in the case of vulnerable or intimidated witnesses, the police should pay particular attention to obtaining alternative forms of evidence with a view to reducing the need for such witnesses to attend court.<sup>920</sup> Therefore, although the Youth Justice and Criminal Evidence Act 1999 has not effected this recommendation, the fact that the Home Office has given it consideration is promising.

#### 5.3.2.2 *Judicial Activity*

Chapter One of this thesis revealed that our judiciary does not do enough to prevent the objectionable treatment of victims during cross-examination.<sup>921</sup> Chapter Two then explained that this lack of intervention is attributable, in part, to the constraints imposed by the adversarial tradition.<sup>922</sup> Ellison contrasts this with the position in inquisitorial systems. There, she explains, judges play a much more active role and, consequently, have greater freedom to intervene to restrict unfair and irrelevant questioning of witnesses.<sup>923</sup> Further, she explains, inquisitorial judges are better placed to identify improper questioning because they will have studied the investigative file before the trial.<sup>924</sup> Adversarial judges, on the other hand, having had no prior cognisance of the case, often do not know the relevance or propriety of evidence until it has been put before the court when, invariably, it is too late to prevent the harm. And, even then, intervention may be risky because, not knowing the defendant's instructions, there is the danger of impeding the running of his case.

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cases, statements made by witnesses at pre-trial hearings held before an examining magistrate will be included in the file (*loc. cit.*).

<sup>917</sup> *Ibid.* at p 41.

<sup>918</sup> See McEwan (1989).

<sup>919</sup> Damaska explains that the oral tradition is not indispensable to the adversarial model for it is only part of its *naturalia*, not its *essentialia* (1973, p 564).

<sup>920</sup> Home Office (1998), Recommendation 76, para 11.

<sup>921</sup> Chapter One, section 1.4.

<sup>922</sup> Chapter Two, section 2.4.

<sup>923</sup> Ellison (1998), p 612.

<sup>924</sup> *Ibid.*



Ellison, therefore, suggests that a more active role for trial judges in this jurisdiction which allowed tighter control of questioning might well have advantages for witnesses here.<sup>925</sup> However, she adds that the dominant role given to judges in civil law jurisdictions is rooted in a trial system that is structured very differently to our own. It is a system that is structured as an official inquiry into the truth as opposed to a party contest and one that has traditionally placed greater trust in public officials.<sup>926</sup> To significantly alter the role of our trial judges would, she says, inevitably disturb the balance of the adversarial trial.<sup>927</sup> Consequently, it is unlikely that radical reform of this nature will ever be implemented. Further, given the attitude of the judiciary in rape cases, it is arguable that giving them greater powers of intervention could be counter-productive.

### 5.3.3 *Enforcing the Rules*

The worst excesses of cross-examination are attributable, not only to adversariness, but also to defence counsel's blatant disregard for the rules together with the failure of both the judiciary and the prosecution to keep him in check. It is suggested, therefore, that a very effective and practicable way of curbing the brutality of cross-examination would be to *enforce* rigourously the protections which already exist within the normal conduct of the criminal trial.

#### 5.3.3.1 *Defence Counsel*

Chapter Two of this thesis revealed that defence counsel's cruelty during cross-examination is often purely strategic, taking the form of a series of tried and tested tactics carried out in order to win the case.<sup>928</sup> It was also explained that it is the adversarial concept of justice which causes the cross-examination process to function in this way.<sup>929</sup> However, it was further shown that defence counsel are not given free rein in how they cross-examine witnesses - codes of professional conduct impose certain ethical constraints on barristers.<sup>930</sup> These constraints are compatible with adversariness because of the importance of procedural integrity under this model - the

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<sup>925</sup> *Ibid.*

<sup>926</sup> *Ibid.*

<sup>927</sup> *Ibid.*

<sup>928</sup> Chapter Two, section 2.2.1.

<sup>929</sup> Chapter Two, section 2.2.2.

<sup>930</sup> Chapter Two, section 2.2.2.

protagonists must conduct their contest *within* the rules.<sup>931</sup> Because of this, Ellison explains, the usual excuse given by defence counsel that any ethical constraints necessarily conflict with his duty to his client, is “unpersuasive” for whilst the assumptions of the adversary process do demand vigorous advocacy, this advocacy must be within proper limits.<sup>932</sup>

Basically, adversariness cannot be blamed for the worst excesses of cross-examination. Rather, these are more accurately attributable to defence counsel’s blatant disregard for the rules, prompted by a desire to win cases at all costs. Therefore, it is suggested that they should be brought to task for breaching the codes of professional conduct which they undertook to uphold when they entered the profession. In its *Speaking Up For Justice* report, the Home Office took a similar view, recommending the setting up of a complaints procedure for complainants who suffer inappropriate cross-examination.<sup>933</sup> Critically, this would include penalties for the barristers concerned.<sup>934</sup> It is here suggested that in addition to a formal complaints procedure for witnesses, independent checks should be carried on how counsel conduct themselves in court. This would formalise the intent to regulate and sanction their activity and consequently would lead to greater adherence to the rules.

#### 5.3.3.2 Prosecuting Counsel

Prosecuting counsel represent the interests of the public, not specifically those of the victim.<sup>935</sup> Nevertheless, they are required to protect victims from improper cross-examination. Clearly this is not being done. The situation in rape trials provides the starkest evidence of this. Section 2 of the Sexual Offences (Amendment) Act 1976 purported to restrict the introduction of irrelevant sexual history evidence. This was to be done by requiring defence counsel to obtain leave from the judge before any such evidence could be admitted. However, Adler found that not only were judges consciously giving leave for cross-examination in situations which clearly conflicted with the intention of the legislator, but questions were frequently being asked without

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<sup>931</sup> Chapter Two, section 2.4.1.1.

<sup>932</sup> Ellison (1998), p 613.

<sup>933</sup> Home Office (1998), p 176.

<sup>934</sup> *Ibid.*

<sup>935</sup> See Chapter Two, section 2.3.1.3.



any application having been made and without any objection being raised by either the judge or prosecuting counsel.<sup>936</sup>

McEwan remarks that prosecutor's indifference here is odd, given that juries are more reluctant to convict those accused of rape when they have heard of the complainant's sexual history.<sup>937</sup> She attributes the problem, not only to the fact that the complainant does not enjoy a lawyer-client relationship with the prosecutor, but also to the fact that some prosecution lawyers have not worked out what the central issues in the case are, nor, therefore, that the questions asked by the defence may be irrelevant.<sup>938</sup> Given the disastrous effect of this type of questioning on the rape complainant's experience in court and, moreover, on the likelihood of conviction, it is absurd that prosecutors do not do more to prevent it. The possibility that this inaction derives from ineptitude is completely unacceptable.

Rape trials involve very complex issues and the implementation of section 41 will undoubtedly bring much greater complexity. Therefore, it is suggested that only experienced counsel should be charged with the task of prosecuting rape cases. Temkin similarly suggests that if rape trials are to be improved, a more robust approach to prosecution must be taken and only those with enough experience to challenge defence strategies should be given the task.<sup>939</sup> Likewise, Harris and Grace report a widespread view among practitioners that barristers should ideally have had several years' experience before tackling rape trials, which call for a degree of specialism.<sup>940</sup> However, ensuring that the prosecutor is suitably skilled and experienced is not easy in any case-type. This comes down to money. Harris and Grace discovered that whilst more serious cases command higher fees, the CPS send rape cases to chambers with relatively small fees attached.<sup>941</sup> This then precludes senior barristers from taking them. Harris and Grace concluded that prosecution standards in rape cases must be improved and, in order to achieve this, greater pay equality between prosecution and defence lawyers must be secured. This would, they say, remove possible imbalances between the expertise which the two sides bring to

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<sup>936</sup> Adler (1987).

<sup>937</sup> McEwan (1992), p 111.

<sup>938</sup> *Ibid.*

<sup>939</sup> Temkin (1998).

<sup>940</sup> Harris and Grace (1999), p 36.

the issues.<sup>942</sup> This view mirrors Glidewell's finding that prosecuting counsel are generally paid much less than defence counsel.<sup>943</sup> On average, CPS fees are about sixty-six per cent of the value of fees paid to defence counsel out of the Graduated Fee Scheme. Consequently, it is suggested that if complex cases are to be prosecuted effectively, the fees paid to prosecution counsel should be drawn into line with those paid to the defence so that suitably experienced counsel will take them on.

### 5.3.3.3 *The Judiciary*

Chapter Two of this thesis described how the adversarial tradition dictates that the judiciary adopts only a very passive role within the trial process.<sup>944</sup> However, it was also shown that, in practice, our trial judges are not nearly so restricted for they enjoy a number of powers and duties which enable them to play a much more active role than that contemplated for the truly passive judge.<sup>945</sup> In theory, these powers mean that judges are well equipped to protect victims from the worst cruelties of cross-examination. In practice, however, they are not being exercised.

A major reason for judicial inactivity is that whilst there is an area of permissible activity, excessive or inappropriate intervention may lead to an overturned conviction.<sup>946</sup> The problem is that the line between permissible and impermissible intervention is by no means clear. This places judges in a considerable dilemma since the price of making a wrong decision is a quashed conviction. This dilemma needs to be resolved if judges are to be more proactive in preventing the abuse of victims in the witness-box. What is needed is clear guidance as to what is unacceptable judicial behaviour in this context. The Home Office has recommended that the Lord Chief Justice issue a Practice Direction "giving guidance to barristers and judges on the need to disallow unnecessarily aggressive and/or inappropriate cross-examination".<sup>947</sup> It is not clear whether the Home Office envisaged this guidance to include *how* this

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<sup>941</sup> *Ibid.*

<sup>942</sup> *Ibid.* at p 49.

<sup>943</sup> Glidewell (1998).

<sup>944</sup> Chapter Two, section 2.4.1.

<sup>945</sup> Chapter Two, section 2.4.1.1.

<sup>946</sup> Chapter Two, section 2.4.1.1.

<sup>947</sup> Home Office (1998), Recommendation 43, para 8.53.

It is important to note that it was explicitly concluded that a mere Practice Direction would be insufficient in the context of rape trials, "given the experience of the last twenty years", to bring judges into line with the objective of section 2 (para 9.65). It was recommended, instead, that section 2 be replaced by a statute which delineated clearly when sexual history evidence may be admitted.



could be achieved but, it is submitted, this would be a crucial feature of any such Direction. Another critical aspect of solving the judicial dilemma would be to establish a clear policy of support in the appellate courts. The point is clearly illustrated in the context of rape trials. Chapter Three highlighted the tendency of the Court of Appeal to overturn convictions in those rape cases where the complainant's sexual history had been withheld.<sup>948</sup> Temkin remarks that this is particularly discouraging since the one thing that does appear to have changed since 1976, if the reported cases are anything to go by, is that *some* trial judges at least are less inclined to permit sexual history evidence and have clearly understood the purpose of section 2.<sup>949</sup> The Court of Appeal may be seen to have undermined the efforts of these judges and, further, to have deterred wider adherence to section 2. The danger is that the Court of Appeal will take a similarly unhelpful approach under section 41.

However, in the context of the rape trial, the failure of the judiciary to protect victims from improper cross-examination cannot be attributed solely to the aforementioned 'dilemma'. In 1998, the Home Office stated that, whilst it is possible for judges to intervene to halt inappropriate cross-examination, this "has to be set against comments made by some members of the judiciary in sex cases which suggest at best lack of sympathy".<sup>950</sup> The inference from this is that some trial judges do not protect rape complainants from improper cross-examination because they are not concerned with what happens to them or else they agree with the objectionable questioning.

Given the distress caused to victims as well as the fact that character evidence tends to be misused by juries and have a distorting effect on the verdict, it is imperative that the judiciary take greater responsibility for ensuring that inappropriate cross-examination is prevented. It is suggested that if they do not discharge this function adequately, they should be held accountable. Commendably, the Home Office has similarly suggested that judicial accountability be increased by, for example, instituting a performance appraisal system and revoking the rule that a judge cannot be sued.<sup>951</sup> There really is no reason for granting the judiciary immunity from

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<sup>948</sup> Chapter Three, section 3.2.

<sup>949</sup> Temkin (1993), p 17.

<sup>950</sup> Home Office (1998), p 176.

<sup>951</sup> Home Office (1998), p 176. The Royal Commission on Criminal Justice had similarly argued that judges should be subjected to a performance appraisal system (1993).

sanction - if they do unjustifiable harm to people who have come or been brought before them for justice they should be made accountable like all other professionals.<sup>952</sup>

#### 5.3.4 *Status for Victims*

The previous section discussed ways in which cross-examination might be made less gruelling for victims. However, the cross-examination ordeal is only one aspect of the shoddy treatment of victims which needs to be addressed. Chapters One and Two revealed that victims are also deprived of information, participation and representation during the processing of their grievance.<sup>953</sup> To victims, this represents a lack of concern with their victimisation and causes them severe disappointment and aggravation.<sup>954</sup> In reality, it is simply the result of the structural role which they occupy within the criminal justice system.<sup>955</sup> Basically, victims have no formal status and, consequently, few formal rights. Accordingly, it is suggested that the key to improving their experience within the legal system is to increase their standing therein. This would do no more than reflect their importance to the functioning of the criminal justice system. That is, if victims failed to report crime and to assist in its prosecution, the criminal justice system would be unable to sanction criminal activity and thereby to impose social control and, in the end, would lose its reason for being. However, despite their practical importance, criminal justice officials both ignore and are ignorant of the attitudes and experience of victims.<sup>956</sup> Consequently, Shapland *et al* describe the victim's position within the criminal justice system as "paradoxical".<sup>957</sup>

Certainly, there has been some shift in attitude toward victims in recent years. Officials are beginning to recognise their importance and how this does not equate with the treatment that they are usually afforded. For example, the Royal Commission on Criminal Justice stated:

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<sup>952</sup> It is true that judges can be dismissed for misconduct, but such powers are rarely exercised and only where judges have been convicted of offences (Lees (1996), p 250).

<sup>953</sup> Chapter One, section 1.3 and Chapter Two, section 2.3.

<sup>954</sup> MacBarnet (1983), pp 299, 300.

<sup>955</sup> See Chapter Two, section 2.3.

<sup>956</sup> Shapland, Willmore and Duff (1985), p 50.

<sup>957</sup> *Ibid.*



The evidence of victims and other witnesses is crucial to the criminal justice process because prosecutions will founder, and guilty people thus escape justice, if victims and other witnesses are not prepared to make statements to the police and thereafter to give evidence. It is important, therefore, that everything possible is done to support and, where necessary, protect witnesses in what is often an unenviable role.<sup>958</sup>

In 1996, the then Chief Constable Charles Pollard made a similar statement:

The willingness of victims and witnesses to come forward and/or give evidence is the oxygen of policing, and indeed of the whole criminal justice system. Turn the oxygen off, or reduce it, and efforts to improve policing and to help communities fight crime will come to naught. It is time for this to change, and time for the system to acknowledge that the concept of 'rights' does not just apply to the defendant.<sup>959</sup>

In addition, the ECHR which is more traditionally concerned with the rights of defendants, is also now talking much more openly about the interests of witnesses and victims.<sup>960</sup> In a recent judgement, for example, the Court said that the "principles of fair trial also require that in appropriate cases the interests of the defendant are balanced against those of witnesses or victims called upon to testify".<sup>961</sup>

This growing recognition of the importance of victims has led to considerable practical change thus proving that their treatment is dictated by their status. For example, Jackson explains that the law of evidence is no longer seen purely in terms of crime control and due process.<sup>962</sup> Rather, there is now much greater recognition of the need to value the interests of victims as well as defendants. Therefore, theorists have begun to develop more victim-oriented, restorative models of criminal justice where the aim of the criminal justice system is not seen in terms of the state, through the courts, prosecuting and punishing offenders, but in terms of the offender restoring or repairing the harm done directly to victims of crime.<sup>963</sup> In addition, whereas twenty years or so ago, there were almost no formal arrangements for the support and assistance of victims, today, expectations in relation to services have been firmed up.<sup>964</sup> For example, the organisation known as Victim Support exists to help victims

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<sup>958</sup> Home Office (1993), para 5.44.

<sup>959</sup> *The Daily Express*, 30/09/96.

<sup>960</sup> Jackson (1997), p 9.

<sup>961</sup> *Doorsen v Netherlands* (1996) 23 ECHR 330 at 358. See also *Van Mechelen v Netherlands* (1998) 25 ECHR 647.

<sup>962</sup> Jackson (1997), p 9.

<sup>963</sup> *Ibid.*

<sup>964</sup> Glidewell (1998), para 80, p 112.

and witnesses and their families at Crown Court Centres throughout England and Wales. The *Victim's Charter* sets out the rights and expectations of victims, setting down the guiding principles that victims deserve to be treated with both sympathy and respect and that any upset and hardship connected with the victim's involvement with the criminal justice system should be minimised.<sup>965</sup> Most recently, the Youth Justice and Criminal Evidence Act introduces a number of procedural initiatives aimed at assisting vulnerable and intimidated witnesses at court.

Such initiatives have effected some positive change.<sup>966</sup> However, evidently, they have proved incapable of eradicating the objectionable treatment outlined earlier in this thesis. It is suggested that in order to ensure the necessary improvement, victims must be given a type of third-party status.<sup>967</sup> This would carry with it certain *unnegotiable* and wholly *enforceable* rights, the most important of which would be the provision of a separate legal representative, for special categories of victim at the least.<sup>968</sup>

#### 5.3.4.1 *Separate Legal Representation*

The advocate would be procured by the victim himself or could be appointed from a pool of advocates (in much the same way as the state provides defence solicitors) where the victim does not already have a solicitor. In recognition of the fact that the victim is performing a "public duty", the state should bear the costs of his or her representation.<sup>969</sup> It is suggested that the advocate should be available during police questioning of the complainant. The need for victims to have someone present at this stage was recognised by the Home Office who envisaged, however, only a

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<sup>965</sup> Home Office (1991) and (1996).

<sup>966</sup> For example, Shapland and Bell noted a "significant improvement" in the practical facilities available to victims in Magistrates' and Crown Courts (1998, p 537). They found that the "vast majority" of courts have not only taken on board the need for facilities for victims and witnesses, but have implemented significant change (*loc. cit.* at p 545). They commend the efforts of magistrates' courts in particular (*loc. cit.*).

<sup>967</sup> Currently, the criminal process countenances only two official parties to a case - the State and the defendant (Chapter Two, section 2.3.1.3). However, it is not here suggested that victims should be given the same status as defendants who enjoy primacy as a consequence of their peculiar vulnerability. Rather, defendants should continue to be paramount and nothing which is done in the name of assisting victims should be allowed to compromise the defendant's right to fair treatment.

<sup>968</sup> Sexual offence complainants in Denmark and Norway are already entitled to legal representation from the moment that they report their assault to the police (Temkin (1987), p 162).

<sup>969</sup> Home Office (1998), para 8.53.



“supporter”.<sup>970</sup> The presence of a legal representative during police questioning of rape complainants would be particularly beneficial in light of the widespread criticism of police practices in this regard. The advocate would, for example, be able to ensure that the investigating officer did not probe the complainant’s sexual history beyond the permitted limit.<sup>971</sup>

From this point onwards the advocate would be responsible for keeping the victim informed about the progress of his complaint. Since Glidewell attributed the current failure to keep victims adequately informed to the absence of a “clear line of responsibility”, centralising the task in this way would ensure its fulfillment.<sup>972</sup> The advocate would also be responsible for preparing the victim for the rigours of the trial process. The argument that this will encourage coaching is without foundation. After all, the opportunity for such foul play already exists because the police may interact freely with witnesses. Furthermore, there is no reference made to the fact that defendants are equally open to being coached. The advocate’s job would simply be to enable the victim to give his evidence in court with the least anxiety possible. In turn, this would have a positive effect on prosecution and conviction rates as more ‘stand up’ witnesses became available.

At court, it is suggested that the advocate operate in conjunction with the prosecutor rather than in his place or as supplementary to him. Therefore, the advocate would not be involved in the prosecution of the case - he would not question witnesses nor address the question of the defendant’s guilt nor advise the victim how to respond to questions. In this way, the traditional adversarial relationship between the state and the defendant would not be compromised. The advocate would perform a more supervisory function, being concerned with such issues as whether the case should be dealt with *in camera*.<sup>973</sup> He would also be expected to ensure that defence counsel abide by the rules regulating the cross-examination process. This takes on particular

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<sup>970</sup> *Ibid.*, Recommendation 22, para 6.7.

<sup>971</sup> Home Office Circular 25/1983 stipulates that “It should not in general be necessary to ask questions about her previous sexual experience... Particular care should be exercised in deciding whether to ask a complainant questions about any previous sexual experience with a third party” (Home Office (1983), para 6).

<sup>972</sup> Glidewell (1998), para 88. This led in one *murder* case to the principal witness being abroad when the trial was listed to start (*loc. cit.*).

<sup>973</sup> Because it is envisaged that the advocate would fulfil only a supervisory and regulatory role, it is suggested that the vulnerability of defendants would not be increased.

significance in the context of the rape trial where much injustice has resulted from abuse of the rules governing the admissibility of sexual history evidence. The advocate would also be required to consult with the victim at the time of plea-bargaining and sentencing and to ensure that the victim's interests were put forward during these processes.

The principal argument in favour of separate legal representation is that it would provide victims with a voice with which they can communicate with the 'system'. This would reduce the sense of isolation and non-involvement currently experienced by them. More importantly, it might also lead to decision-making which more closely reflects the interests of victims. Ultimately, providing even restricted victim-groups with personal legal representation would provide the strongest statement of official commitment to the welfare of victims because it would give victims status, something which reform measures to date have stopped short of doing.

### *Summary*

Victims as a whole are treated very shabbily within our criminal justice system. This cannot be reconciled with their role as the "oxygen" of this system. Promisingly, victim issues are gaining in profile, suggesting that greater efforts will be made to secure their interests. However, unless any future reforms take into account the structural and functional factors responsible for this shoddy treatment, they will have the same minimal effect as the piecemeal measures to date. The previous discussion revealed that what is needed primarily is greater accountability amongst criminal justice officials and also greater status for victims. Other important changes include placing greater reliance on documentary evidence and procedural measures of the type introduced under the Youth Justice and Criminal Evidence Act 1999.

## **5.4 Conclusion**

The central objective of this thesis has been to provide an overview of how the treatment of rape victims within the criminal justice system might be improved to best effect. Critical to achieving this objective was understanding both what the central dilemmas facing this victim-group are and, moreover, why these dilemmas exist. These issues were resolved throughout the course of chapters One to Four. Thus, the major difficulties affecting rape victims were shown to be the generic brutality of



cross-examination, their exclusion from the processing of their grievance (with the many attendant negative ramifications of this), and the evidential peculiarities of the rape trial.<sup>974</sup> These difficulties were duly shown to derive from the structural, functional and cultural nature of our criminal justice system.<sup>975</sup>

This present chapter has channelled all of this information into a bundle of reform suggestions encompassing evidential, substantive, procedural, structural and cultural change. Some of these measures address only those problems which are unique to rape victims; others are aimed at improving the treatment of victims generally. Consequently, a truly holistic approach to reform has been provided, offering fullest assistance not only to rape victims but to victims as a whole. In addition, so as not to compromise the utility of this study, the greatest care has been taken in this final chapter to ensure that the reforms suggested herein are entirely practicable and worthwhile.

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<sup>974</sup> See, principally, Chapters One and Three in this regard.  
<sup>975</sup> See Chapters Two and Four in this regard.

## *Conclusion*

The primary objective of this thesis has been to provide an effective and comprehensive response to the considerable problems facing rape victims within the criminal justice system. The key proposition of this study is that, if real improvement is to be achieved, a root and branch approach to reform must be taken. That is, any reforms must go directly to the source of the problems facing this victim-group. Consequently, a critical objective of this thesis was to identify as accurately and fully as possible the factors underlying the objectionable treatment of rape victims.

The traditional explanation for the shoddy treatment of rape victims is that it is the product of a specific prejudice against them. This perspective derives from the assumption inherent in most rape literature that the difficulties incumbent upon rape victims are singular to them. However, a central argument of this thesis was that most rape literature is methodologically flawed because of its tendency to examine the treatment of rape victims without making any comparative reference to the treatment of victims as a whole. It was argued that the narrowness of this approach precludes a full understanding of the factors shaping the rape victim's experience. This is, in fact, the inherent paradox of most rape literature - its very concern to isolate the rape victim for special attention renders it incapable of explaining their experience at all. Consequently, this study aimed to provide a much broader framework for understanding why rape victims are treated as they are. To this end, a comparative methodology was adopted, the most objectionable aspects of the treatment of rape victims being examined within the context of the treatment of victims as a whole. This comparative exercise revealed that there is, indeed, a distinct margin of difference between how rape and non-rape victims are treated.<sup>976</sup> It was shown that a number of the rules of evidence which apply in a trial for rape are irreconcilable with the conduct of trials generally. These unique rules have caused rape complainants enormous hardship and, moreover, have significantly inhibited conviction rates for this crime. However, this comparative analysis further revealed that there are also significant similarities between how rape and non-rape victims are treated.<sup>977</sup> For example, the cross-examination process represents a gruelling ordeal for all victims.

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<sup>976</sup> See Chapter Three.

<sup>977</sup> See Chapter One.



The finding that important aspects of the shoddy treatment of rape victims are common to all victims equally demonstrated that it is clearly erroneous to explain the rape victim's experience simply in terms of negative attitudes towards them. Certainly, it was shown that this victim-group does encounter exceptional prejudice within the criminal justice system but this can only be used to account for their *differential* treatment therein.<sup>978</sup> It was duly shown that the structural and functional features of our criminal justice system are responsible for the difficulties which rape victims experience alongside victims generally.<sup>979</sup> These features include the constraints imposed by adversarial processes and structures, the structure and logic of legal talk, the laws of evidence and the judicial concept of relevance, the ways in which lawyers are trained to cross-examine witnesses and interpret evidence, and courtroom work practices.<sup>980</sup> Because these features are endemic to the judicial process, they create problems for all victims, regardless of case-type.

Recognising the impact which these systemic factors have on the treatment of rape victims proved critical to the issue of reform, demonstrating that, whilst eradicating those difficulties which are unique to this victim-group is crucial to improving their lot, the generic deficiencies of the judicial process must also be addressed if their suffering is to be *fully* alleviated. Consequently, the reform proposals made in this thesis encompassed not only modifying the substantive and evidential law of rape as well as addressing the cultural prejudice against this victim-group but also reducing the inherent brutality of the cross-examination process and increasing the status of victims generally.<sup>981</sup> This comprehensive approach to reform is to be contrasted with the traditional tendency to focus narrowly on how to improve those aspects of the rape victim's treatment which are peculiar to them.

Of course, it is all very well to identify the changes which must be made in order to improve the treatment of rape victims but the question is whether these changes are at all likely to be made. Certainly, the Youth Justice and Criminal Evidence Act 1999 has effected important procedural and evidential reform within the law of rape.<sup>982</sup>

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<sup>978</sup> See Chapter Four.

<sup>979</sup> See Chapter Two.

<sup>980</sup> Brereton (1997), p 259.

<sup>981</sup> See Chapter Five.

<sup>982</sup> The changes wrought by this Act were discussed in Chapter Five of this thesis.

However, whilst these changes will provide rape victims with some respite, they are quite insufficient to offer a total solution to their problems. As explained, the treatment of rape victims will be fully resolved only when the cultural prejudice against them is dispelled and the generic deficiencies of the judicial process are eradicated. However, the problem following the 1999 Act is that, having offered some response to the difficulties facing rape victims, it is extremely unlikely that the government will pursue further reform in the name of this victim-group. However, this need not mean that the opportunity to effect the necessary cultural and structural reforms has been lost. It is suggested that these specific objectives can easily be pursued in the name of victim-welfare generally, an issue which recent developments indicate is burgeoning.<sup>983</sup> That the interests of rape victims can be secured in this way is clear from the argument put forward in this thesis that a necessary part of improving the treatment of rape victims involves improving the treatment of victims as a whole. Even addressing the cultural prejudice specifically toward rape victims can take place as part of improving the treatment of victims generally. It was shown that the single most important step in dispelling this prejudice would be to democratise the criminal justice system.<sup>984</sup> However, given the race, ethnic, class and youth issues which the current composition of the legal system must surely pose, increasing its representativeness needs to go beyond merely redressing the gender imbalance. Therefore, democratising the criminal justice system is something which needs to be done for the benefit of all victim-groups and, indeed, defendants.

To conclude, it is submitted that this thesis has provided a fuller and more accurate representation of the treatment of rape victims than that traditionally provided by rape commentators. It is hoped that this thorough and honest account has both highlighted the need for reform and illuminated the way to achieve it.

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<sup>983</sup> See Chapter Five, section 5.3.4.

<sup>984</sup> See Chapter Five, section 5.2.3.3.



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